National Energy Board | Office national de l'énergie

# Reasons for Decision

## Trans Mountain Pipeline ULC on behalf of Trans Mountain Pipeline, L.P.

## RH-2-2011

December 2011

**Firm Service to Westridge Marine Terminal**

Canada

National Energy Board

# Reasons for Decision

In the Matter of

**Trans Mountain Pipeline ULC on behalf of Trans Mountain Pipeline, L.P.**

Application dated 29 November 2010 for the approval of Firm Service to the Westridge Marine Terminal on the Trans Mountain Pipeline under Part IV of the *National Energy Board Act*

**RH-2-2011**

**December 2011**

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## Glossary of Terms and Abbreviations

| | |
|---|---|
| Act or NEB Act | National Energy Board Act |
| ADOE | Alberta Department of Energy |
| Advanced Dock Nomination | 2-day advance date for nominations to Westridge dock |
| Aframax tanker | marine vessel with a crude oil cargo capacity loaded over the Westridge dock of up to approximately 87 400 $m^3$ (550,000 bbls) |
| AFUDC | allowance for funds used during construction |
| Application | application from Trans Mountain dated 29 November 2010 for Firm Service to Westridge dock and amendments to certain provisions in the Trans Mountain Rules and Regulations Tariff |
| Astra | Astra Energy Canada Inc. |
| bbls/bpd | barrels/barrels per day |
| barge | marine vessel capable of carrying crude oil cargos in excess of 430 $m^3/d$ (2,700 bbls) |
| BC | British Columbia |
| Bid Premium | Westridge Dock Bid Premium |
| Board or NEB | National Energy Board |
| BP | BP Canada Energy Trading Company |
| CA | Confidentiality Agreement |
| Capacity Allocation Procedures Decision | series of letter decisions of the Board made between March 2006 and August 2007, relating to capacity allocation procedures on the Pipeline |
| Cenovus | Cenovus Energy Inc. |
| Chevron | Chevron Canada Limited and Chevron Canada Resources |
| ConocoPhillips | ConocoPhillips Canada Resources Corp. |
| Dock or Westridge dock | Trans Mountain's marine crude oil loading facility at its Westridge Marine Terminal in Burnaby, British Columbia |

| | |
|---|---|
| Expansion Rights | Firm Service Shippers' rights to first priority of their contract volumes held under the TSA, in the event of an expansion of the Pipeline |
| Firm Service | contracted Westridge dock capacity on the Trans Mountain Pipeline system |
| Firm Service Fee | amount to be paid ($/bbl) by Firm Service Shippers in addition to the effective uncommitted toll |
| Firm Service Shippers | shippers that have signed a 10-year TSA for Firm Service on the Pipeline, including Astra, Cenovus, Nexen, PetroChina and U.S. Oil |
| Firm Service Toll | toll payable by each of the Firm Service Shippers, which toll is the sum of the uncommitted toll plus the Firm Service Fee |
| Imperial | Imperial Oil Limited |
| Land or Land Destinations | all Pipeline destinations other than the Westridge dock |
| $m^3$, $m^3/d$ | cubic metres, cubic metres per day |
| Negotiated Toll Settlement | Negotiated Toll Settlement for final tolls for 2011 on the Pipeline, approved under Board Order TO-02-2011 dated 29 April 2011 |
| Nexen | Nexen Marketing |
| Open Season | the process in which Trans Mountain offered existing capacity on its Pipeline and received offers of firm commitment for some of that capacity |
| PetroChina | PetroChina International (America), Inc. |
| PGI | Purvin and Gertz Inc. |
| Pipeline | Trans Mountain pipeline system |
| Priority Destination | a refinery, marketing terminal or other facility connected to and capable of receiving petroleum from Trans Mountain facilities or those of its subsidiary, Trans Mountain Pipeline (Puget Sound) LLC, and so designated by the National Energy Board |
| RH-4-2008 | Reasons for Decision dated October 2008 relating to Trans Mountain Tariff 74 application |

| | |
|---|---|
| Shell | Shell Trading Canada/Shell Canada Limited |
| Shipper Group | BP, ConocoPhillips, Shell, Suncor, and Tesoro |
| Special Deposit account | an account to hold Firm Service Fees in excess of capital project expenditures |
| Step-up Rights | an option to double a Firm Service contract volume prior to offering any such additional volume to any other shippers or third parties in an expansion open season |
| Suncor | Suncor Energy Marketing Inc. |
| Tariff | petroleum tariff setting out the rules and regulations governing the transportation of petroleum on the Pipeline |
| Tesoro | Tesoro Canada Supply and Distribution Ltd. |
| Trans Mountain | Trans Mountain Pipeline ULC on behalf of Trans Mountain Pipeline, L.P. |
| TSA | Transportation Service Agreement |
| TMX-1 | phase 1 of the TMX Anchor Loop Expansion Project |
| Uncommitted Dock Shipper | Westridge dock shipper who has not executed a TSA |
| Uncommitted Shippers | Land and Uncommitted Dock Shippers |
| U.S. Oil | U.S. Oil & Refining Co. |
| WCSB | Western Canada Sedimentary Basin |

## Recital and Appearances

**IN THE MATTER OF** the *National Energy Board Act* and the Regulations made thereunder;

**IN THE MATTER OF** an application dated 29 November 2010 by Trans Mountain Pipeline ULC as General Partner for Trans Mountain Pipeline L.P. for Firm Service to the Westridge Marine Terminal on the Trans Mountain pipeline system pursuant to Part IV of the *National Energy Board Act*, filed with the National Energy Board under File No. OF-Fac-Tolls-Group1-T260-2010-04 01;

**IN THE MATTER OF** National Energy Board Hearing Order RH-2-2011 dated 24 March 2011;

**HEARD** in Calgary, Alberta on 22, 23, 24, 25 and 26 August 2011;

**BEFORE:**

| | |
|---|---|
| G. A. Habib | Presiding Member |
| R. R. George | Member |
| L. Mercier | Member |

| Appearances | Participants | Witnesses |
|---|---|---|
| *Applicant* | | |
| M. Buchinski<br>L. Keough | Trans Mountain Pipeline ULC | S. Stoness<br>N. Rinne<br>R. Hinger<br>S. J. Kelly |
| *Companies* | | |
| D. G. Davies<br>D. P. Langen | Astra Energy Canada Inc. | K. Tychonick |
| A. L. McLarty, Q.C.<br>M. L. Voinorosky | BP Canada Energy Trading Company | K. Friesen<br>C. Le Tavec<br>M. G. Matwichuk |
| D. G. Davies<br>D. P. Langen | Cenovus Energy Inc. | P. Reimer |
| K. B. Bergner | Chevron Canada Limited<br>Chevron Canada Resources | P. Gray<br>G. McCutcheon<br>S. Gaske |
| R. A. Neufeld, Q.C. | ConocoPhillips Canada Resources Corp. | M. G. Matwichuk |

| | | |
|---|---|---|
| C. Brett<br>P. J. Landry | Imperial Oil Limited | |
| D. G. Davies<br>D. P. Langen<br>K. Heywood | Nexen Marketing | D. Zumwalt |
| D. G. Davies<br>D. P. Langen | PetroChina International (America), Inc. | S. Dove |
| R. A. Neufeld, Q.C. | Shell Trading Canada/Shell Canada Limited | M. G. Matwichuk |
| R. A. Neufeld, Q.C. | Suncor Energy Marketing Inc. | G. Brownie<br>M. G. Matwichuk |
| D. E. Crowther | Tesoro Canada Supply & Distribution Ltd. | M. G. Matwichuk |
| D. G. Davies<br>D. P. Langen | U.S. Oil & Refining Co. | C. Proudfoot |

*Governments*

| | | |
|---|---|---|
| C. King<br>M. Huk<br>G. Dixon | Alberta Department of Energy | |
| K. Lozynsky<br>C. Hales | National Energy Board | |

## Chapter 1

# Introduction

## 1.1 Overview

On 29 November 2010, Trans Mountain applied to the Board, under Part IV of the *National Energy Board Act* (Act or NEB Act), requesting approval of Firm Service on the Trans Mountain pipeline system (Pipeline) with respect to certain capacity to the Westridge Marine Terminal (Westridge dock or Dock). As part of the implementation of Firm Service, 4 300 cubic metres per day ($m^3/d$)[1] (27,000 barrels per day (bpd)) of existing Land capacity would be reallocated to Westridge dock capacity. Land capacity would then be 35 000 $m^3/d$ (221,000 bpd) and Westridge dock capacity would be 12 600 $m^3/d$ (79,000 bpd). Of the total Westridge dock capacity, 8 600 $m^3/d$ (54,000 bpd) would be subject to firm commitments as determined through an Open Season with the remaining 4 000 $m^3/d$ (25,000 bpd) available for uncommitted volumes.

Trans Mountain also requested the approval of Tariff amendments to implement the Firm Service and for approval to use the Firm Service Fee as a customer contribution and the associated reporting of the collection and investment of the Firm Service Fees.

## 1.2 History

The Pipeline transports a range of crude and refined petroleum products from Edmonton, Alberta and points in Northern British Columbia to delivery locations in British Columbia. Delivery locations include those at the Westridge dock for offshore exports and to a U.S. affiliate for export from Sumas, British Columbia to four Washington state refineries. The Pipeline is the only crude and refined petroleum products pipeline providing transportation to the West Coast of Canada. Figure 1.1 provides a map of the Pipeline.

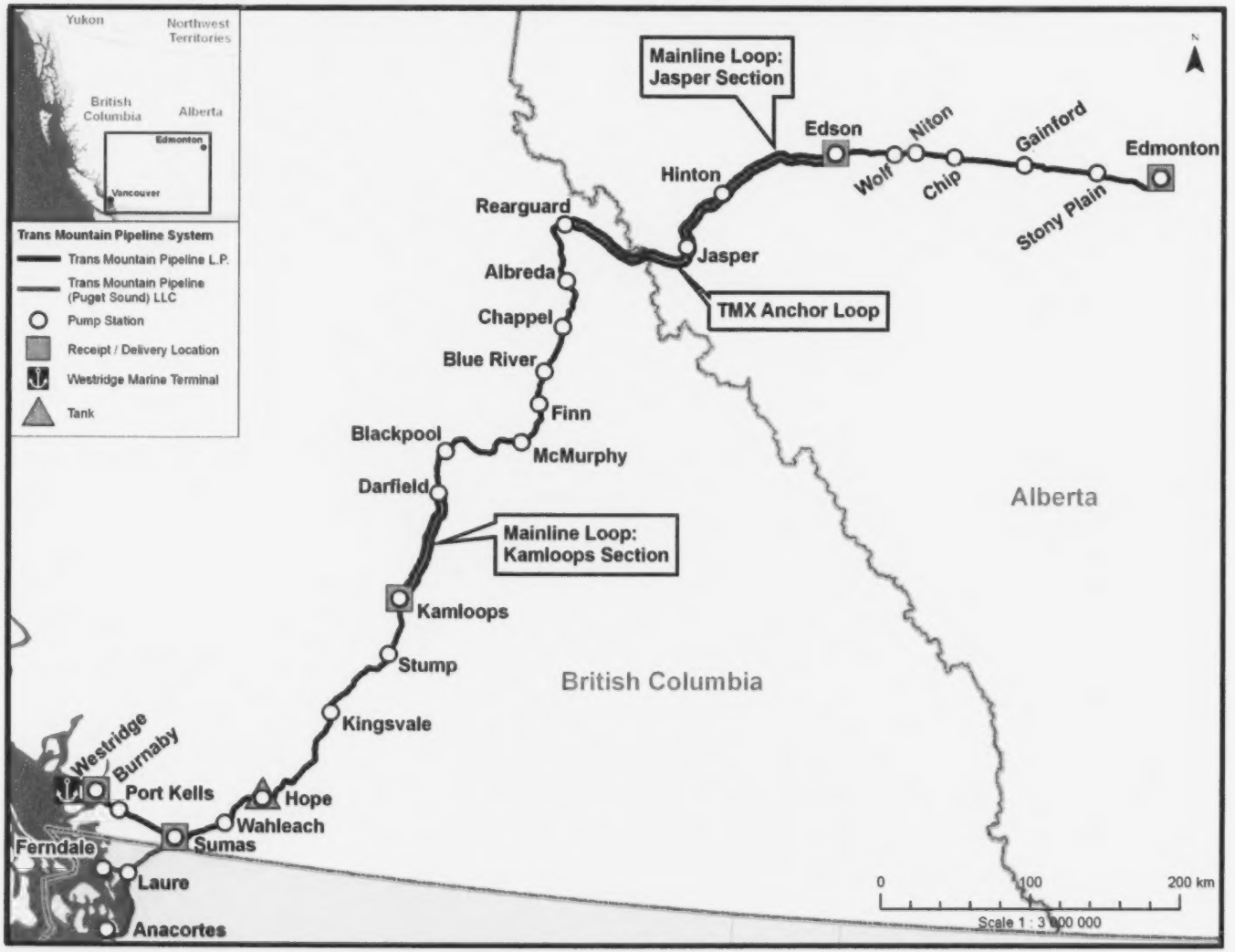
Due to the unique characteristics of marine deliveries, nominations to the Westridge dock cannot be apportioned in the same manner as nominations to Land Destinations. Deliveries to the Westridge dock must be vessel-sized, coordinated with marine transportation schedules and take place on an "all-or-nothing" basis.

Since 2003, the Pipeline's capacity has been allocated between Land shippers and Dock shippers; to date, neither category of shipper has held any contracted or firm capacity. In 2003, Trans Mountain amended its Tariff to introduce capacity allocation procedures based on delivery destination. Since then, allocation of the Pipeline capacity between delivery destinations has changed several times.

By 2005, the Pipeline capacity of 36 000 $m^3/d$ (225,000 bpd) was regularly operating under apportionment. In 2006, Trans Mountain applied to increase capacity through the pump station expansion by 5 600 $m^3/d$ (35,000 bpd); in 2008, the TMX-1 was completed adding another 6 400 $m^3/d$ (40,000 bpd) of capacity and bringing the total Pipeline capacity to 48 000 $m^3/d$ (300,000 bpd).

1 All cubic meters per day have been rounded to the nearest hundred

**Figure 1-1**
**Map of the Trans Mountain Pipeline System**



Of the current Pipeline capacity, 39 400 $m^3/d$ (248,000 bpd) is allocated for shipments to refinery and terminal locations in British Columbia and Washington State and 8 300 $m^3/d$ (52,000 bpd) is allocated to Westridge dock.

Trans Mountain submitted that, since 2004, there has been a steady increase in deliveries to the Dock. Currently, nominations for Westridge dock capacity are allocated on a monthly basis using a Board approved bid premium method (Westridge Dock Bid Premium), a unique feature of the Pipeline.

## 1.3 The Hearing Process

On 29 November 2010, Trans Mountain filed an Application with the Board requesting approval for Firm Service to the Westridge dock, together with related relief. Letters of comment from several parties indicated opposition to the Application.

After considering the comments received, the Board decided to convene a public hearing and issued Hearing Order RH-2-2011 on 24 March 2011. The Hearing Order also included a draft List of Issues.

The Board subsequently issued a revised List of Issues on 27 April 2011 to reflect concerns raised by some parties. A letter of clarification on the draft List of Issues was issued 6 May 2011. The revised List of Issues is attached as Appendix I.

The oral portion of the hearing was held in Calgary, Alberta from 22 to 26 August 2011.

## 1.4 Participants

**Intervenors**

Interventions were received from 18 parties. Evidence was filed by:

- **Firm Service Shippers:** Astra Energy Canada Inc. (Astra), Cenovus Energy Inc. (Cenovus), Nexen Marketing (Nexen), Petrochina International (America) Inc. (PetroChina) and U.S. Oil & Refining Co. (U.S. Oil) supported the Application. Each company adopted its respective evidence. These companies may be referred to in the Reasons for Decision individually, or collectively as the **Firm Service Shippers**.
- **Shipper Group:** BP Canada Energy Trading Company (BP), ConocoPhillips Canada Resources Corp. (ConocoPhillips), Shell Trading Canada/Shell Canada Limited (Shell), Suncor Energy Marketing Inc. (Suncor), and Tesoro Canada Supply & Distribution Ltd. (Tesoro) opposed the Application and may be referred to individually, or collectively as the **Shipper Group**. BP and Suncor adopted their respective evidence. Evidence on behalf of the five companies was also filed by Mr. M. Greg Matwichuk of Stephen Johnson Chartered Accountants. This evidence was adopted by BP and Suncor.
- **Chevron:** Chevron Canada Limited (Chevron Canada) and Chevron Canada Resources (Chevron Resources) were opposed to the Application. Each company adopted its respective evidence. Chevron Canada and Chevron Resources will be referred to in the

Reasons for Decision as **Chevron**. Expert evidence on behalf of Chevron was also filed and adopted by Dr. Stephen Gaske.

- **Intervenors** who presented final argument but did not file evidence include:
  - Imperial Oil Limited (Imperial), who opposed the Application; and
  - Alberta Department of Energy (ADOE) who supported the Application.

## 1.5 Letters of Comment

The Board received 139 letters of comment from the following:

- Ministry of Attorney General – British Columbia;
- Georgia Strait Alliance;
- Islands Trust;
- MEG Energy Corp.;
- Gulf Islands Alliance;
- Osum Oil Sands Corp.;
- Rainforest Conservation Foundation;
- West Coast Environmental Law, Western Canada Wilderness Committee, Living Oceans Society, ForestEthics and the Dogwood Initiative;
- Cowichan Tribes; and
- Various individuals.

The letters of comment submitted by various individuals requested, among other things, that an oral hearing be scheduled in Vancouver, British Columbia and that the deadline for comments be extended. On 18 July 2011, the Board issued a letter denying this request, as it was not persuaded that the oral hearing should be moved to another location or that the deadline for comments should be extended.

On 19 August 2011, the Board responded to a request made by Cowichan Tribes that the Board postpone the oral hearing due to an alleged lack of consultation related to the Application. In the Board's letter response to the Cowichan Tribes, the Board indicated that it was not persuaded to postpone the hearing but that Board counsel and others may ask questions of Trans Mountain at the hearing to address the issues raised regarding the appropriateness of the consultation undertaken. The Board also provided information regarding the process available to the Cowichan Tribes in the event it wished to make further submissions to the Board.

A more complete discussion of the concerns raised in the letters of comment filed can be found in Chapter 2.

## Chapter 2

# Consultation

Regulated companies are required to design and implement an appropriate public consultation program, commensurate with the setting, nature and magnitude of the project applied for. Chapter 3 of the NEB Filing Manual sets out the guidelines for consultation activities the Board expects to be undertaken.

**Submissions of Trans Mountain**

Trans Mountain noted that the Application was of a commercial nature made pursuant to Part IV of the Act. It designed and implemented its consultation program with a focus on notification of, and discussions with, commercial third parties. Trans Mountain submitted that it did not engage in consultations with parties other than commercial third parties, given the nature of the Application and the guidelines set out in the Filing Manual. Details of the consultation program undertaken with respect to commercial parties are discussed in Chapter 4 under section 4.2 entitled Open Season.

In terms of the potential impact of the Application on members of the public or other third parties, Trans Mountain confirmed that no new facilities, modifications to existing facilities, or capacity were being proposed as a result of the Firm Service offering. In Trans Mountain's view, the Application did not raise issues typically associated with facilities applications. Further, Trans Mountain anticipated that marine traffic resulting from the Firm Service offering would be approximately the same as that experienced in 2009 and 2010, being an average of 12 000 to 12 700 $m^3$/d (75,000 to 80,000 bpd).

Trans Mountain stated that the volumes shipped off the Westridge dock and the number of tankers required to move those volumes are affected by several factors, including market demand and customers' requirements for specific lot sizes. In addition to the limitations caused by the need to ship in lots, a physical limitation exists due to the amount of tank storage available at the Dock. Based on existing physical limitations, Trans Mountain advised that the Westridge dock could currently ship upwards of 23 900 to 31 800 $m^3$/day (150,000 to 200,000 bpd). In March 2009, shipments off the Westridge dock peaked at 22 700 $m^3$/day (143,000 bpd).

Trans Mountain confirmed that the existing facilities and current overall capacity of the Pipeline were approved through prior decisions of the Board. Trans Mountain further confirmed that if any additional or upgraded facilities were required to accommodate greater Pipeline capacity, which in turn could increase tanker traffic, additional regulatory approvals would be required.

Finally, Trans Mountain noted that the regulation of tanker traffic specifically falls under the purview of regulators other than the Board.

**Submissions from Letters of Comment Filed**

A number of the letters of comment received by the Board stated that Trans Mountain had failed to conduct an appropriate consultation program.

More specifically, commenters indicated that approval of the Application would, among other things:

a) Guarantee Trans Mountain an ability to ship a minimum average of 12 600 $m^3$/d (79,000 bpd) from the Westridge dock;

b) Increase the number and/or size of tankers travelling through Burrard Inlet and Georgia Strait, without adequate public engagement or environmental assessment; and

c) Lay the groundwork for further expansion of tanker and barge activity from the Westridge dock.

Several commenters stated that Trans Mountain did not sufficiently engage and consult with Aboriginal groups, coastal communities and other stakeholders, in light of what they viewed as the potential for increased tanker traffic and the related environmental risks and disturbances.

Further, commenters argued that the Application ought to be considered in a more integrated manner beyond the Westridge dock and in the context of future applications and expansions which could be facilitated through approval of the Application.

Some commenters also took the position that the approval of Firm Service contracts could constrain the ability of government regulators to ensure acceptable levels of environmental and social risks associated with future tanker traffic.

***Views of the Board***

The Board notes the concerns raised in the letters of comment filed regarding the appropriate level of consultation and public engagement to be undertaken for the Application.

The Board also notes, however, that Trans Mountain, through its Application, is seeking approval for Firm Service to the Westridge dock, together with associated tolls and tariff matters under Part IV of the Act. The Application is not for the approval of new facilities or capacity on the Pipeline but rather is for a change of service for a portion of existing capacity.

Authorization for the existing physical capacity of the Pipeline, approximately 47 700 $m^3$/d (300,000 bpd), was granted through previous approvals of the Board. The Board is accordingly of the view that the Application will not increase marine traffic beyond levels that could presently occur under the existing authorizations.

The Board further notes that a decision related to this Application does not in any way pre-determine the Board's environmental assessment or public interest determination in relation to any future applications to expand capacity on the Pipeline. Any expansion plans would require a facilities application to the Board which would include, among other things, a rigorous environmental assessment and the design and implementation of an appropriate consultation program with all potentially impacted third parties.

In terms of any potential increase in tanker traffic, the Board notes that the regulation of tanker traffic falls under the purview of other regulators; this decision should not constrain those regulators in fulfilling their statutory obligations and oversight role.

Based on the above, the Board is satisfied that Trans Mountain has designed and implemented an adequate consultation program given the nature of the Application.

## Chapter 3

# Firm Service: Market Considerations

The Pipeline connects Western Canadian crude oil supply to North American and international markets. A number of market-related considerations were discussed during the course of the proceeding, including: the need to respond to market signals; Trans Mountain's concern over its ability to compete; and the potential for Firm Service to enhance market development and improve netbacks and pricing.

## 3.1 Response to Market Signals

**Submissions of Trans Mountain**

Trans Mountain submitted that the Application was made in response to shippers' requests and is intended to meet market demand as well as balance the interests of Westridge dock shippers and Land shippers. Recent growth in Alberta's oil sands production and growing demand for Canadian crude in West Coast and other Pacific Rim markets has created a demand for firm capacity on the Pipeline to the Westridge dock.

Trans Mountain also submitted that the Application is not designed to solve the problems related to the apportionment process and the concerns raised about nominations on the Pipeline.

Trans Mountain submitted that it had previously tried expansion of the Pipeline without success. In 2006, it ran an open season to expand the Pipeline from 47 700 $m^3/d$ to 63 600 $m^3/d$ (300,000 bpd to 400,000 bpd). It received bids for firm service in the amount of 35 800 $m^3/d$ (225,000 bpd) of the total proposed pipeline capacity. In Trans Mountain's view, this was not an acceptable amount of committed shipper support for the expansion; it was seeking 54 100 $m^3/d$ (340,000 bpd). Since 2009, Trans Mountain has been discussing an expansion with its shippers and evaluating shipper support.

According to Trans Mountain, starting in 2009, a number of shippers indicated that the combination of uncertainty associated with acquiring capacity through a bidding process and the price uncertainty related to acquiring capacity to the Westridge dock was making it difficult to market Canadian crude to offshore markets. Certain shippers indicated that they would be interested in firm capacity to alleviate this uncertainty and allow for greater market development. Based on the results of a non-binding expression of interest in April 2010 and subsequent discussions with existing and prospective shippers, Trans Mountain moved forward with a binding Open Season.

Trans Mountain stated that, since Land shippers did not request firm service, it was not part of the Open Season offering. Trans Mountain also noted that the Westridge dock shippers appear to value capacity more than Land shippers given, among other things, the size of the Bid Premium. Accordingly, the Application proposes to allocate more capacity to Westridge dock shippers, without making radical changes for the Land shippers.

Trans Mountain submitted that it focused on developing an innovative solution to the chronic and growing uncertainty in securing Dock capacity and in the cost of acquiring that capacity using the Bid Premium. It stated that the current uncommitted nature of monthly nominations was contributing to the uncertainty of shipping off the Westridge dock. Trans Mountain further submitted that the distinction between Land and Dock (with Dock capacity allocated on the basis of highest Bid Premium and Land allocated on the basis of nominations) is inefficient for allocation and apportionment purposes. Higher demand for Westridge dock capacity has been apparent through shipper requests for firm service, chronic apportionment, increasing Bid Premiums, and an oversubscription of the Firm Service Open Season. However, Dock shippers have not had any access to additional allocated capacity even though they appear to value the capacity more than Land shippers.

Trans Mountain also discussed the growth of the Bid Premium. Currently, the Bid Premium is refunded to shippers in the form of a revenue requirement reduction. Table 3-1 shows the size of the Bid Premium and its effect on annual average tolls since it was instituted in 2006. Trans Mountain calculated that, for 2011, the Bid Premium would be in the order of $200 million, on an overall revenue requirement of approximately $270 million. Trans Mountain submitted that the refund of the Bid Premium to the revenue requirement may be appropriate when it is small, but because it is much larger than anyone anticipated, it is akin to a subsidy and is therefore inappropriate. Trans Mountain stated that Land shippers' desire to retain the benefits from the Bid Premium may be a factor negatively influencing tolling negotiations. According to Trans Mountain, the way to solve these problems would be to use the money on an activity such as system upgrades or to provide the premium to the Pipeline owner in a way that motivates expansion.

**Table 3-1**
**Westridge Dock Bid Premium**
(Thousands of Canadian dollars except where noted)

| | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|---|---|---|---|---|---|---|
| Revenue Requirement (with revenue adjustments) | 130,768 | 157,251 | 194,856 | 237,464 | 220,803 | 270,496 |
| With refunds | 130,768 | 157,251 | 186,671 | 214,275 | 198,138 | 228,793 |
| Bid Premiums Collected | 4,808 | 53,294 | 18,473 | 12,509 | 57,341 | 87,808 (Q1) |
| Total Bid Premiums Refunded | 0 | 4,808 | 8,185 | 41,428 | 34,956 | 41,702 |
| Average Toll without refunds ($/m$^3$) | 10.19 | 11.18 | 13.32 | 15.96 | 14.80 | 16.15 |
| Average Toll with refunds ($/m$^3$) | 10.19 | 10.85 | 12.76 | 13.38 | 12.58 | 13.66 |

Trans Mountain added that when it designed the Firm Service offering, the market environment was different from the prevailing conditions at the time of the oral hearing. When Firm Service was initially designed, the demands on the Pipeline were strong to the Westridge dock and there

was underutilized capacity to Land destinations. The price environment was very different than the high differential environment seen since late 2010, with Canadian crude being heavily discounted compared to global crude. Purvin and Gertz Inc. (PGI) stated that it expected this situation to be resolved within a few years as more pipeline capacity becomes available.

Trans Mountain indicated that, in making the Application, it relied on past Board decisions where the Board has interpreted and applied its mandate in a way that allowed pipelines to respond to changing market conditions. Specifically, Trans Mountain noted that the Board has previously adopted a flexible approach to addressing capacity allocation requirements on the Pipeline.

**Submissions of the Firm Service Shippers**

The Firm Service Shippers argued that expansion is the only viable means to alleviate the capacity issues on the Pipeline. The Firm Service Shippers acknowledged they had requested that Trans Mountain provide the certainty of service needed to develop markets off the West Coast.

**Submissions of the Shipper Group**

In BP's view, the Application seemed to be an opportunistic reaction to a short-term market environment and one that is likely to achieve little in the way of longer-term objectives or benefits.

**Submissions of Chevron**

Chevron was of the view that nobody is getting what they want on the Pipeline right now. In its view, the ultimate solution would be for Trans Mountain to discuss expansion with shippers, as the Application would not solve the underlying lack of capacity that is currently experienced for Land as well as for Westridge dock shippers.

According to Dr. Gaske, the proposal would be less responsive to shipper demand than the existing system, as it fails to address the large curtailments recently imposed on Land shippers and because the Open Season was over-subscribed. The proposal would only exacerbate existing problems.

## 3.2 Ability to Compete

**Submissions of Trans Mountain**

Trans Mountain suggested that the competitive landscape has changed with the introduction of contract carriage on other pipelines serving the Western Canada Sedimentary Basin (WCSB) and the recent general expansion of pipeline capacity to U.S. markets. Trans Mountain submitted that it is reasonable to conclude that given the excess pipeline capacity and the transportation choices available to shippers, all pipelines compete for volumes. Trans Mountain specifically identified its competition as current and future common carriage and contract carriage pipelines serving the WCSB. Trans Mountain stated that, as a result, it is facing circumstances where it is critical to be able to respond to competitive market forces and meet the needs of its shippers.

Trans Mountain further described the risk it faces from other pipelines having firm service commitments. Specifically, it identified the potential to under-collect its revenue requirement resulting in toll increases. Potential for under-collection of its revenue requirement would be exacerbated by significant new take-away pipeline capacity from Western Canada.

According to Trans Mountain, Firm Service would help to mitigate the potential impacts of the availability of firm service on other pipelines. In Trans Mountain's view, denying it the opportunity and ability to offer Firm Service would be unfair. The benefits of Firm Service would include retention of volumes on the Pipeline, which would reduce the risk of toll volatility and could lead to reduced or lower tolls.

**Submissions of the Firm Service Shippers**

The Firm Service Shippers agreed that Trans Mountain faces volume risk. Both Nexen and Cenovus indicated that, as shippers, they have choices in terms of where to sell their crude oil. Nexen acknowledged that it currently ships on competing pipelines and indicated that, in its view, Trans Mountain also faces competition from announced projects.

Astra added that shippers who have contracted to ship on other pipelines face a sunk cost, in the form of take-or-pay agreements, and will likely ship on those lines. As a result, Astra submitted that if a pipeline like Keystone XL is built as approved, as many Canadian barrels as possible will clear in the Gulf Coast, drawing barrels away from the West Coast. Similarly, PetroChina indicated that in its analysis of the Firm Service offering, it identified risk to itself given the incremental pipeline expansion to the Gulf Coast.

**Submissions of the Shipper Group**

Suncor questioned whether there was significant volume risk noting that, based on the forecasts provided in the hearing, the Pipeline would likely be full for the next decade. Suncor pointed out, as stated in the Negotiated Toll Settlement, the volume risk is on the shippers and not the Pipeline.

While Suncor acknowledged that having part of the Pipeline under firm contracts may help alleviate risk to Trans Mountain, Suncor largely disagreed with Trans Mountain's approach to addressing volume risk and suggested that there were better approaches. The Enbridge Mainline Competitive Toll Settlement was cited by Suncor as an example of shippers and a pipeline company working together to address issues related to the competitiveness of a common carrier pipeline system.

**Submissions of Chevron**

Chevron agreed with Suncor that volume risk falls to shippers and questioned the significance of the volume risk over the next decade given the fact that, as a monopoly, Trans Mountain possesses a location advantage and serves a distinct market. Further, Chevron noted that Land shippers are heavily dependent on Trans Mountain and therefore the volume risk is low.

Dr. Gaske indicated that, in the context of the current Application, Trans Mountain's concerns about its ability to compete with firm service on other pipelines is misplaced as the Pipeline is

currently oversubscribed and cannot attract new customers unless it expands. Dr. Gaske stated that he failed to see how Trans Mountain would become more competitive by reducing the quality of service and access it provides to existing shippers.

## 3.3 Market Development

**Submissions of Trans Mountain**

Trans Mountain identified "continued offshore market development" as a significant benefit of Firm Service to the Canadian oil industry. Trans Mountain submitted that the certainty provided by Firm Service to the Westridge dock would allow Firm Service Shippers to develop long-term relationships with new and existing offshore markets for Canadian crude oil. It would expose Canadian crude production to diversified markets, resulting in increased acceptance and utilization of Canadian crude oil in those markets. This would provide other producers with improved and more diversified market opportunities.

Trans Mountain suggested that market development should be one of the goals that the Board considers in making its decision on the Application. Trans Mountain concluded that until such time as expansion is supported commercially by shippers, Firm Service is a reasonable step in support of continued development of existing and new offshore markets for Canadian crude. Moreover, Trans Mountain stated that the development of new markets, at a time when traditional markets are posing challenges, is beneficial to all producers.

**Submissions of the Firm Service Shippers**

Four of the five Firm Service Shippers viewed the Application as a "first step" in longer-term market development. These Firm Service Shippers argued that the opportunity for more effective market development would be a benefit of the Application. The fifth Firm Service shipper, U.S. Oil, indicated that its main motivation for committing to Firm Service was to have security of supply for its Tacoma, Washington refinery.

Astra explained the process by which Canadian crude is currently sold into offshore markets and contrasted it with the certainty provided by Firm Service. In essence, without Firm Service, when Canadian crude oil is sold into the offshore market on a spot basis, it is generally of less interest because of buyer uncertainty related to supply and cost. PetroChina pointed out that while it would like to buy barrels of Canadian crude oil, it is adversely impacted by the Bid Premium variability.

The Firm Service Shippers also agreed that refiners need a chance to evaluate the crude oil they are going to buy before committing to buy larger quantities. Nexen added that firm access to the Westridge dock could also prove the concept that West Coast access makes sense for producers.

**Submissions of the Shipper Group**

BP suggested that there was no clear evidence or support for Trans Mountain's claim that Firm Service to the Westridge dock would improve access to offshore markets. BP commented that developing new markets when Trans Mountain cannot service existing customers is not appropriate.

**Submissions of Chevron**

Chevron indicated that it has been actively participating in market development off the Westridge dock. Chevron noted that it would lose access to downstream markets in the U.S. and Asia under the proposed Application and that the Firm Service Shippers would have the ability to exert an unacceptable level of influence over Western Canadian markets. Chevron also argued that if producers lose access to the Westridge dock, they may pursue market development elsewhere.

**Submissions of the Alberta Department of Energy**

ADOE urged the Board to take a longer-term view when making its decision and submitted that, as Canadian production increases, producers will have to negotiate entry into new markets. In ADOE's view, Board approval of the Application would send an appropriate signal to the Asia Pacific market that Canadian producers are not only interested, but able to develop long-term market relationships.

## 3.4 Netbacks and Pricing

**Submissions of Trans Mountain**

Trans Mountain submitted that Firm Service will lead to higher netbacks for Canadian crude oil producers. Trans Mountain identified three general reasons for current discounts on sales of Canadian crude oil in offshore markets accessible from the Westridge dock:

1. Uncertainty of supply;
2. Administrative costs in acquiring a new crude; and
3. Increased cost in processing and testing a new crude type.

Trans Mountain indicated that the Firm Service offering stemmed from the concern over supply uncertainty. Trans Mountain submitted that the certainty of space provided by Firm Service to the Westridge dock would essentially guarantee removal of volumes from the clearing market for Canadian crude oil and this would lead to higher prices in Alberta for all Canadian producers.

**Submissions of the Firm Service Shippers**

The Firm Service Shippers pointed to the certainty of Firm Service as a critical aspect that would impact prices for all producers and therefore netbacks. Under the current system, the Firm Service Shippers stated that there is no certainty from month to month that Canadian volumes will be removed from the clearing market.

**Submissions of the Shipper Group**

BP disagreed with the pricing benefits alleged by Trans Mountain and suggested that there was little analysis to support the claim of increased netbacks to producers. Suncor agreed with BP's conclusion. Both parties suggested that because no incremental pipeline capacity is included in the Application, it is difficult to accept that the Firm Service offering would have an appreciable effect on prices.

**Submissions of Chevron**

Chevron disagreed with the price uplift suggested by Trans Mountain and commented that the result of the Firm Service Application would simply be changing one shipper name for another and this would not impact the price at Edmonton. In Chevron's view, any pricing related benefit would fall to the Firm Service Shipper, in the form of arbitrage between Edmonton prices and offshore prices, and not back to the producer, unless the Firm Service Shipper is itself a producer.

***Views of the Board***

**Market Signals**

The Board recognizes that there are clear signals of demand for Westridge dock capacity: shipper requests for firm service; chronic apportionment; increasing Bid Premiums; and an oversubscription of the Firm Service Open Season. The Board also sees that the recent price discounting is putting demand pressure on Land capacity leading to high levels of apportionment for those shippers.

The Board understands the desire of producers to sell in higher-priced markets and refiners to purchase heavily discounted Canadian crude. This, in the Board's view, has contributed to the recent strong demand for Land Destinations and the continued desire for additional deliveries to the Westridge dock, as manifested by high levels of the Bid Premium. Certainty of access to transportation provides producers and shippers with greater market certainty and buyers with assurance of supply.

Several parties acknowledged that expansion is a potential solution to the current apportionment challenges. The Board notes that expansion is not part of this Application and therefore does not take a position on the appropriateness of an expansion of the Pipeline. The Board acknowledges that Trans Mountain attempted to obtain shipper commitments to expand the Pipeline in 2006; however, in Trans Mountain's view, it did not obtain sufficient support to proceed. The Board notes that Trans Mountain has continued to have discussions with shippers regarding expansion since 2009.

Given existing capacity and current demand for firm pipeline access, the Board acknowledges the innovative nature of Trans Mountain's Application in responding to market requests. The Board understands, when the Application was filed, Land shippers did not face apportionment at the same level experienced since November 2010. Notwithstanding the increased Land nominations, the Board still sees the Application as a reasonable response to market requests.

**Ability to Compete**

More recent market developments, specifically the allowance of contracts on other oil pipelines and the increased desire to diversify markets for Canadian crude oil, have changed the environment in which Trans Mountain operates. The Board agrees that Trans Mountain faces competition from current and future pipelines serving the WCSB, including those common carriage pipelines with some contracted capacity.

In the short to medium-term, the Board views Trans Mountain's volume risk as low, primarily because of the increased demand due in part to price discounting of Canadian crude oil. Over the long-term, the Pipeline faces volume risk due to pipeline expansions and shipper choice. Several shippers acknowledged that they typically sell in markets that yield the highest netback. The Board agrees with Trans Mountain that Firm Service will help retain volumes and lower its long-term volume risk.

**Market Development**

The Board recognizes the importance of market development for Canadian crude oil producers. Uncertainty in acquiring pipeline capacity to the Westridge dock could be an obstacle to developing new offshore markets. The certainty of space and cost to the Westridge dock will likely, in the Board's view, enhance the ability of Canadian producers to develop long-term relationships with buyers in new markets and lead to increased acceptance and utilization of Canadian crude oil in non-traditional markets.

**Pricing and Netbacks**

While the Application did not propose any new capacity, Trans Mountain argued that the certainty provided by Firm Service, in addition to increased allocation to the Westridge dock, would remove volumes from the market clearing point. The Board agrees that removal of crude oil from the clearing market is directionally supportive of higher prices. The Board views that individual Firm Service Shippers may benefit from a higher netback price with the introduction of Firm Service. However, the Board is not convinced that there will be a material impact on prices or netbacks for all Canadian producers.

## Chapter 4

# Firm Service: Common Carrier Obligations

Subsection 71(1) of the NEB Act embodies the common law concept that oil pipelines under the Board's jurisdiction are 'common carriage' pipelines. It states:

> Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.

## 4.1 Common Carrier: General

**Submissions of Trans Mountain**

Trans Mountain acknowledged that it had not identified any pipelines with similar circumstances with respect to drivers for firm capacity. However, it noted that the Board has acknowledged that the market for oil transportation has evolved and will continue to evolve to embrace commercial arrangements better suited to meet the needs of market participants. In Trans Mountain's view, the Board has consistently demonstrated a willingness to accommodate the circumstances encountered by new and existing pipelines through a flexible approach to the regulation of pipelines under its jurisdiction.

Trans Mountain indicated that, in its view, the definition of common carriage would include contracts. Trans Mountain pointed out that it has not asked for an exemption from subsection 71(1) of the NEB Act as it does not require one in this case.

Trans Mountain argued that it conducted a comprehensive Open Season that enabled all interested parties to make an informed decision regarding whether they would participate. In addition, Trans Mountain noted that it would retain a measure of spot capacity on its entire system and that the uncommitted Westridge dock capacity represents approximately one third of the total Westridge dock capacity, which is a conservative amount. According to Trans Mountain, it had therefore complied with its common carrier obligations and the requested service offering should be implemented.

Trans Mountain submitted that existing shippers, by virtue of their past use of a pipeline, are not entitled to any form of priority status or the setting aside of capacity for their exclusive use.

**Submissions of the Firm Service Shippers**

The Firm Service Shippers argued that subsection 71(1) grants the Board broad authority and allows the Board to tailor the obligations of the pipeline to the facts of a particular case. Also,

there is nothing in subsection 71(1) to suggest that firm service to new and diverse markets can only be introduced when an expansion is proposed.

**Submissions of the Shipper Group**

BP submitted that section 71 of the NEB Act imposes common carrier obligations on every oil pipeline under the Board's jurisdiction, absent an exemption, and none was requested. BP viewed these obligations as involving a monthly nomination process where all shippers would have access to the capacity of the Pipeline. In BP's view, the Application makes Trans Mountain less able to meet its obligation to accept all oil tendered to it.

According to BP, capacity that is used and useful should not be arbitrarily removed from common carriage service for reason of obtaining a higher value from others for that capacity. Specifically, it seems unfair for capacity to be withdrawn from the service available to Uncommitted Shippers when some shippers receive value from the change in service while others lose value.

In BP's view, the value currently being realized by common carriage shippers with respect to shipments off the Westridge dock will diminish if the Firm Service proposal is approved. That is, it will negatively impact the cost of doing business for many shippers. BP stated that it was not opposed to contracted capacity in the appropriate circumstances and historically, such circumstances have been where there is an expansion or an addition of capacity.

Suncor/Shell/ConocoPhillips argued that Trans Mountain appears to have deliberately ignored the obligations imposed on it under section 71 of the NEB Act or at least has interpreted its obligations in a way that Suncor/Shell/ConocoPhillips do not agree with.
Suncor/Shell/ConocoPhillips also argued that in previous Board decisions, contract carriage underpinned the capital cost of new capacity. Moreover, in each of those cases, the Board was satisfied that the requirements of common carriage shippers could be met.

Tesoro argued that subsection 71(1) of the Act empowers the Board to grant exemptions, but Trans Mountain did not request one. Tesoro also argued that Trans Mountain cannot currently ship all oil that is tendered and should not be allowed to make changes, such as those proposed in the Application, that make it less able to do so in the future.

Mr. Matwichuk pointed out that where there is a shortage of existing common carriage capacity and no specified incremental capacity, the conversion of common carriage capacity to contract carriage capacity is unprecedented.

**Submissions of Chevron**

According to Dr. Gaske, pipelines have an obligation to accept all oil that is tendered. Therefore, pipelines should be expanding as oil is tendered beyond a pipeline's existing capacity and the Board should be concerned about making sure that they fulfill that obligation.

**Submissions of Imperial**

Imperial argued that Trans Mountain's approach goes against the principles underlying common carriage pipelines. This approach is inappropriate where there is no new investment and where, historically, the market has used the pipeline.

According to Imperial, there is no suggestion that the demand for Westridge dock capacity will decrease over the next 10 years and, therefore, converting common carriage capacity to contract is not an adequate response to the excess demand. Specifically, it is inappropriate to convert existing common carriage capacity to contract where existing common carriage demand exceeds capacity. To do so would prejudice Uncommitted Shippers by restricting access to capacity to both Land Destinations and to the Westridge dock. Also, open access is especially important when many shippers have based their investments and operations on the fundamental premise that the pipeline is a common carrier pipeline with no contract carriage.

## 4.2 Open Season

**Submissions of Trans Mountain**

Trans Mountain submitted that, in response to shipper and producer requirements and growing market demand, it offered firm transportation service agreements (TSAs) for pipeline capacity to Westridge dock through an open season process. Trans Mountain stated that it offered to talk to its shippers regarding the reallocation of 4 300 $m^3/d$ (27,000 bpd) of capacity from Land to Dock as a component of the Firm Service offering, but that some shippers chose not to consult on the Application.

From February to April 2010, Trans Mountain held a series of group and one-on-one meetings with existing and prospective shippers to discuss its proposal for Firm Service.

On 8 April 2010, Trans Mountain sent out requests for non-binding expressions of interest to all shippers with which it had communicated directly or indirectly in earlier meetings. Eight responses totaling in excess of 15 900 $m^3/d$ (100,000 bpd) were received. Based on those results and subsequent discussions, Trans Mountain determined that there was sufficient interest to hold a binding Open Season.

In April 2010, Trans Mountain further invited existing and prospective shippers to enter into confidentiality agreements (CAs) to begin discussions on the substance of the Firm Service offering. Trans Mountain stated that it presented drafts and solicited feedback from the parties on the Open Season documents. A total of 11 CAs were executed prior to the Open Season. Meetings continued in August 2010 and the Open Season documents were adjusted to reflect some of the issues raised.

On 1 September 2010, the Open Season commenced. Trans Mountain notified all existing and prospective shippers by email and also advertised in several major publications. The public notice included a brief overview of the commercial terms, including the scheduled closing date of 30 September 2010.

Trans Mountain extended the Open Season to 7 October 2010 in order to accommodate changes to the initial Open Season documents. All parties submitting requests for Firm Service were required to sign binding TSAs.

Trans Mountain received a total of nine TSAs from seven parties. Five bids with 10-year terms were accepted. On 8 October 2010, all shippers that submitted documents were notified of whether they were successful in their bid for Firm Service capacity.

Trans Mountain argued that the Open Season process undertaken, as detailed in its Application, was extensive and fully transparent and fair, providing potential shippers with an equal opportunity to participate. In Trans Mountain's view, potential shippers would have been fully aware of the service offering and the consequences of not participating. Trans Mountain asserted that, in the circumstances, the Open Season process fully complied with its obligations as a common carrier pipeline.

**Submissions of the Firm Service Shippers**

The Firm Service Shippers stated that Trans Mountain had conducted a fair and transparent Open Season. All parties were given the same opportunity to acquire firm service and the benefits associated with the offering.

**Submissions of the Shipper Group**

None of the members of the Shipper Group challenged the procedural aspects of the Open Season process. Several members of the Shipper Group, however, took the position that the Firm Service offering that was being sold in the Open Season was not appropriate.

Suncor/Shell/ConocoPhillips noted that the Act does not define or refer to the term "open season". In practice open seasons have been used for different purposes, primarily at the project development stage, with the objective of securing sufficient support to demonstrate need.

Suncor/Shell/ConocoPhillips took the position that not only was the product being sold inappropriate, but that it came with significant baggage for existing common carrier shippers. These shippers would have been forced to support, or remain silent, in respect of Tariff amendments and provisions to which they were fundamentally opposed.

BP stated that it took no position as to the appropriateness of the Open Season. However, BP challenged the substance of the offering, and took the position that used and useful common capacity should not be sold at auction to the highest bidder. In BP's view, the Application was an auction of scarce capacity.

Tesoro similarly took issue with the substance of the service being offered in the Open Season, and indicated that offering some of the existing uncommitted capacity to the Westridge dock as committed capacity is inappropriate. Tesoro argued that Trans Mountain is currently unable to ship all oil tendered to it for service to the Westridge dock and that situation will worsen with the approval of the Application.

**Submissions of Chevron**

Chevron did not suggest that the strict procedural aspects of the Open Season process were flawed. However, Chevron did take the view that the Firm Service offering that was being sold in the Open Season was not appropriate due in part, at least, to the bundling of services.

## 4.3 Capacity for Monthly Nominations

The Board has previously looked at, among other things, the capacity available for monthly nominations or spot shipments when considering common carrier obligations of an oil pipeline that seeks to offer some contracted capacity. In this case, Trans Mountain proposed a reallocation of capacity from Land Destinations to Westridge dock in order to continue to meet its common carrier obligations.

Currently, the capacity of the Pipeline is notionally[2] 47 700 $m^3/d$ (300,000 bpd). In the Application, Trans Mountain proposed to reallocate 4 300 $m^3/d$ (27,000 bpd) of capacity from Land Destinations to the Westridge dock. The uncommitted Pipeline capacity would continue to be nominated on a monthly basis as per the current system. Table 4-1 shows the current capacity and the allocation proposed by Trans Mountain in the Application.

**Table 4-1**
**Current and Proposed Allocation on the Trans Mountain Pipeline System**

| | Land | Uncommitted Dock | Committed Dock |
|---|---|---|---|
| Current Allocation ($m^3/d$) | 39 400 (248,000 bpd) | 8 300 (52,000 bpd) | N/A |
| Proposed Allocation ($m^3/d$) | 35 100 (221,000 bpd) | 4 000 (25,000 bpd) | 8 600 (54,000 bpd) |

After the reallocation, the amount of contracted capacity would be 18 per cent of the total Pipeline capacity while 82 per cent would remain as uncommitted capacity. The 4 000 $m^3/d$ (25,000 bpd) for Uncommitted Dock Shippers is equivalent to one Aframax tanker and 2 barges. Land would be allocated 74 per cent of the total Pipeline capacity.

***Submissions of Trans Mountain***

Trans Mountain clarified that it was not asking for the reallocation to be considered separately from the other elements of the Application. According to Trans Mountain, there is a collaborative process for handling reallocation issues; however, it acknowledged that it has been difficult to achieve consensus.

In Trans Mountain's view, in addition to meeting the Firm Service and NEB Act requirements, the proposed allocation of capacity is reasonable and an appropriate balancing of both shipper and Trans Mountain's interests.

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2 Pipeline capacity references are approximate as actual capacity of the Pipeline is dependent on the percentage of heavy crude shipped, maintenance scheduling and carry over in any given month.

When designing the Firm Service offering, Trans Mountain sought to strike a balance between the competitive interests of all shippers on the Pipeline, recognizing the changing market place. It did this by attempting to balance the apportionment percentages for the Land Destinations and the Westridge dock. Trans Mountain submitted that it tested the reallocation against historical, current and forecast conditions.

On a historical basis, Trans Mountain pointed out that the proposed allocation would have meant slightly more apportionment for Land shippers; however, Westridge dock shippers would have had a significant reduction in apportionment. Since the last Board-approved allocation in 2008, up to November 2010, advanced nominations to the Westridge dock exceeded the allocated capacity while Land nominations were generally lower than the allocated Land capacity. Trans Mountain argued that it follows that there appears to have been an over-allocation of capacity to Land.

In order to test the reallocation using forecast conditions, Trans Mountain requested PGI to provide a throughput forecast for the Pipeline until 2020 based on certain assumptions. Trans Mountain used the high throughput scenario and calculated the anticipated apportionment on the system using the proposed reallocation of capacity. It determined that, on an annual basis, Land shippers and Uncommitted Dock Shippers are not expected to be apportioned until 2017 and 2019, respectively. Trans Mountain stated that it anticipates that the existence of the Firm Service contracts would likely reduce the demand for uncommitted Westridge dock capacity.

Trans Mountain also tested the proposed reallocation against the nominations and deliveries from November 2010 to August 2011, when there was an increase in overall demand for Pipeline capacity. It determined that the proposed allocation would still have been more equitable between Land and Westridge dock shippers, as evidenced by more balanced apportionment percentages. PGI submitted that, in its view, the current pricing situation, which has given rise to the increase in demand, will likely resolve itself in a couple of years.

Trans Mountain acknowledged that with any allocation method, when the Pipeline is full, there will be parties who do not get what they nominate or bid. Trans Mountain agreed that, in circumstances where the Westridge dock and Land are heavily constrained, it is difficult to compare the apportionment numbers. However, when Land is not apportioned, the comparison is valid.

PGI questioned the validity of the Shipper Group forecast for Pipeline deliveries as presented by Mr. Matwichuk, as PGI was of the view that it was not based on any fundamental analysis or validation exercise. PGI submitted that the material would be better described as a survey of the Shipper Group for the period through 2020.

**Submissions of the Firm Service Shippers**

The Firm Service Shippers argued that the Land shippers have the bulk of the Pipeline capacity, which has generally been enough to meet their needs, while the Westridge dock shippers are paying the bulk of the costs. In this context, the Land shippers have no incentive to support an expansion and, in fact, have an incentive to keep the Bid Premiums as high as possible to keep

their tolls low. The Firm Service Shippers also argued that it is difficult to gain support for an expansion in these circumstances.

**Submissions of the Shipper Group**

According to BP, the common carrier obligation is not about creating a better allocation methodology; it is about assuring that sufficient capacity is being reserved to satisfy uncommitted volumes. BP argued that the Application made insufficient capacity available for Uncommitted Shippers. In BP's view, the reallocation reflects a reallocation of costs to Land shippers in order to generate more revenues for Trans Mountain and that it is unfair to do this simply because the limited capacity on the system makes it possible.

BP also submitted that the reallocation of capacity that would otherwise be available to Land shippers will result in a greater level of apportionment among Land shippers through 2020. While BP acknowledged that existing Land shippers do not have any acquired rights to Pipeline capacity, the net effect is that the burden of the reallocation will be borne by Land shippers.

BP stated that, typically, when an application involving a reallocation is brought before the Board, the pipeline has negotiated with its shippers taking into account all of the relevant principles. According to BP, this type of consultation has not happened with respect to the Application. BP also submitted that Trans Mountain and its shippers are probably in the best position to understand operational and logistical constraints and other impacts associated with reallocation.

Suncor stated that it is concerned that the reduction of Land capacity is likely to impact its ability to meet its market and contractual requirements. Suncor also submitted that it is concerned that its access to the Westridge dock will be restricted as a result of the reduction of common carriage Westridge dock capacity and the Firm Service Shippers having control of commodity types and loading windows.

Mr. Matwichuk provided an aggregated forecast of Shipper Group Washington state land deliveries to the Pipeline. Mr. Matwichuk concluded that Land capacity for Washington State throughput would be in apportionment into 2020, even without the reallocation. He also stated that the reduction in available capacity would harm common carriage shippers relying on Land capacity.

**Submissions of Chevron**

Chevron submitted that it believes that the current Tariff is more fair and equitable than the one proposed. Chevron asserted that the historical time period that Trans Mountain relied on to determine the reduced Land demand was too narrow and submitted that the Board should look back to 2004. Chevron stated that the recent increased use of the Pipeline demonstrates there is continued strong demand for Land capacity and it is unwise to seek to justify long-term shifts of capacity out of the Land category based only on short-term usage patterns.

Chevron stated that the reallocation would result in reduced Westridge dock access and this could drive producers and shippers away from the Westridge dock and from looking for Pacific Rim market development opportunities.

Dr. Gaske supported the continuance of the current system and submitted that the Application is not equitable to many of the Land shippers that would experience greater curtailments of their service. The Application establishes a clear preference for Firm Service Shippers over Land and Uncommitted Dock Shippers.

According to Dr. Gaske, pursuit of an expansion of overseas markets can only be accomplished at the expense of shippers that were not able to secure long-term firm capacity. Further, the reallocation does not recognize the commitments made by legacy customers and the degree to which they rely on the existing capacity distribution between Land and Westridge dock shippers. Land customers have made significant investments to obtain feedstock from Trans Mountain and these are the customers that market power regulation is designed to protect.

In Dr. Gaske's view, captive onshore refineries require at least as much certainty of supply on the Pipeline as offshore refineries that are likely to have access to numerous alternatives. In his view, denying service to a large body of customers who have demonstrated over a long period of time that they are willing to pay for the service is not economically efficient as it can leave them with idled or under-utilized facilities.

### 4.3.1 Apportionment Mitigation Methods

**Submissions of Trans Mountain**

Trans Mountain submitted that the proposed Tariff offers a number of ways for shippers to mitigate any apportionment that may occur. Mitigation opportunities would include:

- 90 per cent of unnominated Firm capacity would be allocated to Land shippers;
- 100 per cent of unnominated, uncommitted Westridge dock capacity would be allocated to Land shippers;
- Unnominated Land capacity would be allocated to Uncommitted Dock Shippers, subject to the nomination of make-up volumes by a Firm Service Shipper and Firm Service Shippers delivering to an alternate delivery point;
- The ability of Firm Service Shippers to name a third party nominee to ship the Firm Service Shippers' monthly volume at a price agreed to between shippers; and
- The ability of Westridge dock shippers to direct their deliveries to a delivery point other than Westridge dock (Alternate Delivery Point) at a price agreed to between shippers plus a fee of $0.25/bbl paid to Trans Mountain.

According to Trans Mountain, the Alternate Delivery Point fee of $0.25 was instituted because it is significant enough that it encourages shippers to use the Firm Service for Westridge dock but not so high that it discourages optimization. The fee would be returned to all shippers by reducing tolls in the following year.

Trans Mountain submitted that bidding at market rates for Westridge dock capacity and redirecting to Land has occurred recently on the Pipeline, demonstrating that shippers have responded in an economically reasonable manner to mitigate apportionment. This type of

redirection is currently allowed only under Force Majeure conditions. The proposed apportionment mitigation methods are simply a more permanent and transparent recognition of such transactions, and reflect the effective dynamic reallocation potential between Land Destinations and the Westridge dock in response to changing market conditions. Trans Mountain stated that the proposed system would give shippers a greater ability to acquire capacity relative to how much they value it.

Trans Mountain stated that it is not proposing that the NEB would have control over the price or mechanism by which Firm Service Shippers sell their capacity. Trans Mountain also stated that it is reasonable to assume that, provided an Uncommitted Shipper is prepared to pay the prevailing market price to access the Westridge dock capacity, it would continue to have access to uncommitted capacity.

Trans Mountain argued that the resulting secondary market would provide for an efficient utilization of the Pipeline and it is not a negative outcome. Trans Mountain also stated that it understands a secondary market for pipeline capacity is common on other pipelines.

**Submissions of Chevron**

Chevron indicated that the apportionment mitigation methods described by Trans Mountain were unlikely to be useful to Chevron, either as a Land shipper or an Uncommitted Dock Shipper. Chevron also assumed that, in general, the Pipeline will be full going forward; therefore, it did not see the mitigation measures being available on a regular basis and could not count on them from a business planning perspective.

As a Land shipper, Chevron stated that only two of the mitigation methods would be available to it, and neither is acceptable. First, with respect to the reallocation of Westridge dock deliveries to Land destinations, Chevron stated that it would leave the Land shipper at the mercy of Westridge dock shippers who would likely adopt an "all-or-nothing" approach to selling their capacity due to discrete cargo sizes. Chevron noted that this could result in potential windfall profits to individual shippers as opposed to offering any benefit to the Pipeline as a whole.

Second, with respect to the allocation of unnominated Firm or uncommitted Dock capacity to Land, Chevron submitted that in 2011, unnominated Westridge dock capacity did not exist and it is unlikely to be available in the near future, specifically if the spot Westridge dock capacity volume is reduced by more than half. In Chevron's view, Firm Service capacity holders can be expected to use the capacity they bid on, leaving little if any for allocation to Land shippers.

As an Uncommitted Dock Shipper, Chevron discussed the available mitigation methods. First, with respect to access to unnominated Land capacity, Chevron noted that unused Land capacity is unlikely to be available as it is common for Land and Westridge dock to simultaneously experience apportionment. Further, Uncommitted Shippers would be third in line to obtain any excess Land capacity. With respect to Firm Service Shippers naming a third party nominee, Chevron indicated that Firm Service Shippers can be generally assumed to desire the Firm Service capacity for their own purposes.

Chevron argued that the current system is more dynamic because it allows new or existing shippers to respond to new information on a monthly basis as opposed to locking in a result for 10 years.

According to Dr. Gaske, Trans Mountain's approach artificially creates market power for the Firm Service Shippers. In addition to an Alternate Delivery Point Fee ($0.25/bbl) remitted to Trans Mountain, the Land shippers must also pay the Firm Service Shippers whatever the market will bear.

**Submissions of Imperial**

Imperial argued that when a common carrier cannot ship all of the oil tendered to it, it is not the time to depart from basic common carrier obligations. This departure would allow a select few shippers to have preferential access to and control of an unregulated secondary market. Imperial also argued that Trans Mountain's proposal would substitute regulation of a monopoly by the NEB with the creation of a secondary market for Westridge dock capacity that is controlled by the highest bidder for firm capacity.

***Views of the Board***

Subsection 71(1) grants the Board broad authority, and, in contrast to some other provisions in the Act, does not specify criteria that the Board must take into consideration. The Act does not define or use the term common carrier; nor does it establish whether, and if so under what circumstances, priority access may be granted on an oil pipeline. The Board has a wide discretion in determining compliance with this section and could, if it found it necessary and appropriate, grant an exemption from the requirements of subsection 71(1).

The Board has, in the past, held that compliance with the common carrier provision is determined by a test of reasonableness, which is a relative concept. It follows that statutory service obligations which are imposed by law on regulated undertakings are relative, rather than absolute, obligations. Subsection 71(1) permits the Board to tailor the statutory obligations to fit any unique circumstances which may exist; therefore, the provision imposing common carrier obligations must be considered within the circumstances of each case.

In considering whether Firm Service should be allowed on the Pipeline, the Board considered the context in which the Pipeline is operating and the reasonableness of the proposal submitted. There has been chronic apportionment on the Westridge dock and shippers are competing for scarce capacity. The Board also considered the unique features of the Pipeline including: the distinct allocation and apportionment methodology of Westridge dock and Land capacity; and the unique nature of Westridge dock shipments, including the fact that deliveries to the Westridge dock must be vessel-sized, coordinated with marine transportation schedules

and take place on a all-or-nothing basis. In the Board's view, this chronic apportionment and the Dock apportionment methodology contributed to the Firm Service Shippers' requests for more certain access to the Pipeline through the Firm Service offering.

While the Board has broad discretion in assessing compliance with subsection 71(1), the Board has indicated in previous decisions that an oil pipeline may meet its common carrier obligations when an appropriate open season is conducted for new facilities or services and sufficient capacity is made available for uncommitted volumes.

**Open Season**

In this case, the Board is satisfied that the Open Season conducted for the Trans Mountain Firm Service offering was adequate. All potentially interested shippers had a fair and equal opportunity to participate in the different phases of the Open Season. Interested parties, all of whom were sophisticated commercial parties, were involved in extensive discussions both in group and one-on-one settings, prior to commencement of the formal Open Season. These parties were further able to choose whether to contract for capacity to the Westridge dock on the same terms, based on their own economic judgment. The Board notes that no party to the proceeding disputed the validity of the procedural aspects of the Open Season process conducted by Trans Mountain.

A number of shippers took issue with the appropriateness of the Open Season, arguing that the substance of the offering was flawed. The Board notes that the Act does not define or refer to the term "open season" and that open seasons have been used for different purposes. In this case, the Open Season offering was for Firm Service of existing capacity to the Westridge dock. The Board notes that demand for the service offered was high, resulting in an over-subscription.

As the Board has confirmed in previous decisions, shippers do not have any acquired rights to capacity on the Pipeline by virtue of past use. As a result, the Board is of the view that there is no significant difference between existing and new capacity on a pipeline such that firm service should only be allowed for new capacity and not allowed for existing capacity. On balance, the Board is satisfied that the substance of the Firm Service offering was appropriate.

**Capacity for Monthly Nominations**

In the Board's view, allowing for long-term contracting of some capacity may be consistent with the obligation of common carrier pipelines to accept and transport all oil delivered for transmission. However, retaining a reasonable level of uncommitted capacity is important. The Act does

not prescribe a specific level of uncommitted capacity that must be reserved. Rather, the determination is a matter of judgment based on the specific circumstances.

Trans Mountain's proposal involves 82 per cent of the Pipeline capacity being available for uncommitted shipments. Of that, 74 per cent of the Pipeline's capacity would be allocated to Land destinations while 8 per cent would be allocated to the Westridge dock as uncommitted capacity. The capacity available for uncommitted Westridge dock shipments would be approximately 30 per cent of the Westridge dock capacity.

While Trans Mountain proposed several methods that shippers may in theory use to mitigate apportionment, in the Board's view, the extent to which these methods may ultimately benefit uncommitted shippers in practice depends on the need for, and use of, the Firm Service capacity by Firm Service Shippers over the next 10 years. The Board finds that it is reasonable to expect that Firm Service Shippers will use the capacity they contracted for.

Land shippers argued that the reallocation is inappropriate because Land shippers continue to need the capacity and they would be harmed if the capacity became unavailable for their use. The Board recognizes that Land shippers will have a lower volume of capacity allocated to them as a result of the Firm Service offering and this could increase apportionment. While a decision of the Board should generally not be unduly burdensome on any individual shipper, the Board does not adhere to a "no harm" test when considering a reallocation. To do so would imply that existing shippers have acquired rights on the Pipeline by virtue of prior use, a concept to which the Board does not subscribe.

The Board finds that the uncommitted capacity that would be available to Land and Dock shippers is reasonable to meet Trans Mountain's common carrier obligation. In the Board's view, the amount of committed capacity is small relative to the total Pipeline capacity and Trans Mountain has allotted an acceptable amount of the Westridge dock capacity for uncommitted volumes.

While Trans Mountain submitted that the proposed reallocation would be more fair and equitable, the Board notes that Trans Mountain's reallocation of capacity from Land to the Westridge dock is primarily designed to ensure that there is sufficient capacity available to meet its common carrier obligations in relation to the Westridge dock. While the Board finds that the remaining capacity for uncommitted volumes is reasonable, the Board is not expressing a view on whether or not the proposed allocation is optimal. No party requested that the Board make such a determination and, in the Board's view, there was insufficient evidence on the record to make a finding on the optimal allocation. The

Board notes that forecasts are inherently uncertain and there were questions raised about the nominations and apportionment percentages. As well, the Board notes that parties considered a more usual course of action for Trans Mountain would have been to discuss the allocation absent the Firm Service with its shippers before applying to the Board. The Board is of the view that the development of objective criteria to determine the appropriateness of any allocation would be beneficial to all parties. The Board encourages Trans Mountain and its shippers to consider the development of such criteria through targeted discussions on an optimal allocation of Pipeline capacity.

**Conclusion**

The Board is satisfied that the remaining level of uncommitted capacity on the Pipeline, in combination with the Open Season process undertaken, is sufficient to enable Trans Mountain to continue to act in a manner consistent with its common carrier obligations. To the extent that the Application requires an exemption under subsection 71(1), it is granted.

The Board acknowledges that on a pipeline without enough capacity to meet demand, any change to capacity access will lead to winners and losers. In this case, Uncommitted Shippers could experience increased apportionment with the introduction of Firm Service. Despite any potential burden on Uncommitted Shippers, as discussed in Chapter 3, the Board recognizes the benefits associated with Firm Service. In addition to responding to market requests, Firm Service will help Trans Mountain retain volumes and lower its long-term volume risk. Moreover, the certainty of space and cost to the Westridge dock will likely enhance the ability of Canadian producers to develop long-term relationships with buyers in new markets and lead to increased acceptance and utilization of Canadian crude oil in non-traditional markets.

The Board finds that the Firm Service is a reasonable method to balance the interests of all parties.

Therefore, the Board approves the Firm Service subject to other Board directions to be provided in the following sections. The Board notes that approval of the Firm Service is unlikely to solve many of the issues discussed as part of this proceeding, including: chronic apportionment; any potential unfairness with the Bid Premium system; and the optimal allocation of existing capacity to the Land and Dock. The Board encourages Trans Mountain and its shippers to continue discussions about these issues and reminds parties that the Board cannot be constrained by contracts and retains jurisdiction to consider complaints from potentially affected parties.

## Chapter 5

# Firm Service Fee

Under the TSA, Firm Service Shippers would be required to pay the Firm Service Toll for their respective contract volume over a 10-year period. The Firm Service Toll would be the sum of: (i) the applicable uncommitted toll from the effective Tariff; and (ii) the Firm Service Fee established through the Open Season process. Trans Mountain would use the Firm Service Fee for advancement of capital projects and preliminary activities in support of expansion of the Pipeline. Some intervenors expressed concerns about the appropriateness of the Firm Service Fee and its treatment.

## 5.1 Appropriateness of the Firm Service Fee

**Submissions of Trans Mountain**

Trans Mountain declined to file the five specific Firm Service Fees, arguing that this information is proprietary and subject to confidentiality agreements between Trans Mountain and each shipper.

According to Trans Mountain, the requirements of section 60 of the NEB Act would be met as the structure of the Firm Service Fee has been disclosed. Specifically, Firm Service Fees are the result of shipper's choice, bid by sophisticated commercial parties in the context of the Open Season. Further, Trans Mountain indicated that the average Firm Service Fee would be $1.45 per barrel with none of the Firm Service Fees being lower than $0.25 per barrel. The annual amount of Firm Service Fees collected would be constant at $28.6 million over the 10-year period.

Trans Mountain further indicated that tolls may generally differ in respect of traffic with differing description, or if the circumstances and conditions under which the traffic is carried is not substantially similar. For the Firm Service Fee specifically, Trans Mountain claimed that the circumstances and conditions of the Firm Service Shippers are not substantially similar to those of Uncommitted Shippers because of the first priority unapportioned access to the Westridge dock. Furthermore, while each Firm Service Shipper would move product to the Westridge dock, their service would be ranked with the highest bidder receiving highest priority service, including commodity selection and the fulfillment of makeup rights.

Considering all of the above, Trans Mountain was of the view that Firm Service Fees are just and reasonable and not unjustly discriminatory. Trans Mountain further took the position that the Firm Service Fee promotes economic efficiency in seeking the most efficient utilization of the Pipeline over the term of the TSA, and otherwise adheres to the principles of inter-generational equity and cost causation.

Trans Mountain submitted that the Firm Service Fee was both a tolling methodology and a tool for efficient allocation of capacity. Further, it was indicated that the circumstances related to this

Application have similarities and differences with the allocation of capacity through the existing Bid Premium. Among other differences, Trans Mountain noted that Firm Service was allocated for a period of ten years rather than one month, and shippers that signed the TSAs agreed on the disposition of Firm Service Fees whereas the disposition of the Bid Premium was not necessarily agreed to by willing bidders.

**Submissions of the Shipper Group**

BP argued that providing priority access to the Westridge dock in exchange for the Firm Service Fee on the basis presented by Trans Mountain could be construed as resulting in unjust discrimination, contrary to section 67 of the NEB Act.

Tesoro submitted that Trans Mountain's proposal fails to meet the requirements of section 62 of the NEB Act because Firm Service Shippers would not all be paying the same Firm Service Toll. In Tesoro's view, the priorities established among the Firm Service Shippers for shipping, commodity selection and make-up rights is too fine of a distinction to justify different Firm Service Tolls. Tesoro further indicated that none of the factors considered by the Board in evaluating the Bid Premium would exist under the Firm Service proposal, mainly because Firm Service Fees are not established through monthly capacity bids.

**Submissions of Chevron**

Dr. Gaske took the position that it would be more appropriate for shippers to pay a regulated rate instead of a market-based fee because in the long term, the Pipeline should be expanding as the market expands. The idea of auctioning long-term capacity at more than a cost-based, regulated rate is unprecedented and would result in Trans Mountain charging a monopoly rate. Dr. Gaske also indicated that the Firm Service offering was set up in a manner he described as first-degree price discrimination. This term refers to a monopoly extracting as much as it can from each shipper by getting as much as it can from the highest value shipper and then from the next highest, thereby dividing up the market.

Dr. Gaske noted that the bidding process for the Firm Service Fee bundled two products: current transportation and priority rights on a future expansion. Chevron argued that, as a result, a determination as to whether the Firm Service Tolls are just and reasonable cannot be made because the tolls, as they specifically relate to transportation service, are unknown.

**Submissions of Imperial**

It was argued by Imperial that using biddable tolls to allocate capacity to the highest bidder would be contrary to the Board's Capacity Allocation Procedures Decision. Imperial indicated that the unique circumstances referred to by the Board in those decisions do not apply in the context of the Application since the Firm Service Toll would be charged whether or not the Pipeline is under apportionment. Further, Imperial was of the view that Firm Service would not relieve the Pipeline from chronic apportionment.

## 5.2 Proposed Treatment of the Firm Service Fee

**Submissions of Trans Mountain**

Trans Mountain indicated that Firm Service Fees would be treated for tolling purposes as a customer contribution and invested in projects designed to enhance existing and future operations of the Pipeline. This proposed usage was supported by all prospective shippers who submitted TSAs in the Open Season process.

Trans Mountain confirmed that Firm Service Fees would be used to support projects after they had passed the speculative stage and had moved to the project development stage. Before finalizing the list of capital projects to be funded with Firm Service Fees, Trans Mountain submitted that input from all shippers would be solicited and investments would be adjusted accordingly, to the extent possible. Trans Mountain was of the view that the proposed investment of Firm Service Fees would benefit all shippers by reducing the cost and scope of future expansions. However, when considered individually, each of the projects would not necessarily benefit all of the shippers in every case. Further, Trans Mountain was of the view that regardless of whether an expansion was to proceed, shippers would benefit from the use of the Firm Service Fee for preliminary activities in exploring expansion opportunities.

Trans Mountain committed to make annual filings with the NEB identifying the amount of Firm Service Fees collected and the disposition of such funds. These filings would have sufficient details to allow the Board and shippers to assess the amounts spent on each project. Trans Mountain was of the view that negotiated settlements or general rate applications would be the appropriate mechanism for the Board or shippers to review the use of the Firm Service Fee. Towards that end, Trans Mountain maintained that such a mechanism would allow shippers or the Board to review preliminary costs incurred prior to project approval.

Trans Mountain noted that there would be no revenue recognition and no rate base impact in treating Firm Service Fees as a customer contribution, since current tax provisions do not recognize these contributions as revenue unless the funds are not used within a three-year time frame. To the extent Firm Service Fees exceed spending on capital projects, the excess Firm Service Fees will be placed in a Special Deposit account. In this case, no allowance for funds used during construction (AFUDC) would accumulate against the capital project and this Special Deposit account would not be included in rate base. Trans Mountain indicated that interest may, however, accumulate at the bank rate on funds while in the Special Deposit account. To the extent that spending on a capital project exceeds available Firm Service Fees, AFUDC would be calculated on the net positive balance of that project. It was Trans Mountain's position that the proposed use of the Firm Service Fee may, but would not necessarily, lead to a higher return for its shareholders as even in the normal course, the costs incurred for an expansion that does not proceed may not have to be written off.

In Trans Mountain's view, treating the Firm Service Fee as a customer contribution creates less market distortion than having tolls artificially lowered through direct toll refunds. Refunding the Firm Service Fee of $28.6 million per year to all shippers would result in Firm Service Shippers paying more than 50% above their cost of service, while Land shippers would pay less than 90%

of their cost of service. Trans Mountain was of the view that this would result in a subsidy from Firm Service Shippers to Land shippers.

**Submissions of the Firm Service Shippers**

Firm Service Shippers considered the use of Firm Service Fees for preliminary activities and feasibility studies to consider expansions as an important aspect of the TSA. In their view, using Firm Service Fees for such purposes would provide more information to understand potential expansion scenarios and better enable informed decisions about whether an expansion would be justified.

Firm Service Shippers also believed that Firm Service and the proposed use of the Firm Service Fees are a necessary first step towards expansion and market development. It was the position of the Firm Service Shippers that the full refund of the Bid Premium has led to lower tolls for Land shippers, which in turn has undermined their incentive to commit to an expansion. As a result, the Firm Service Shippers argued that approval of the Application would ultimately be beneficial to all Trans Mountain shippers.

**Submissions of the Shipper Group**

Members of the Shipper Group argued that Trans Mountain failed to provide any convincing evidence to demonstrate that the proposed use of the Firm Service Fee would benefit all shippers. It was the Shipper Group's view that, without an actual application, it cannot be determined whether and to what extent shippers would benefit from any given project. Among other things, such a determination would require an assessment of the proposed expansion costs and the manner in which it would be tolled. The Shipper Group also expressed concerns about the use of the Firm Service Fee for preliminary activities in support of expansion. Specifically, the Shipper Group argued that there is no evidence that shippers would benefit from predevelopment costs that have already occurred but have not yet been charged to customers. It was further argued that a pipeline company should not be looking to its customers to fund business development activities.

The Shipper Group stated that the Firm Service Fees would not necessarily lower the tolls of future expansions because, especially in the case of potential market-based tolls, there is uncertainty as to how those expansions would be tolled.

The Shipper Group noted that Dock shippers and Land shippers are for the most part the same companies. As a result, any perceived cross-subsidization from Dock shippers to Land shippers is not as straightforward as it may seem. Further, in terms of concerns raised regarding a cross-subsidization from the existing Bid Premium, the Shipper Group indicated that the Bid Premium was a method to allocate capacity and any outstanding issues could be dealt with in future years in the context of an incentive toll settlement.

Tesoro submitted that the proposed use of the Firm Service Fee is inappropriate and should not be approved. Tesoro argued that Trans Mountain would be unrestricted in applying the Firm Service Fees to cover the costs of future expansions even if the expansion does not proceed. Among other issues raised, Tesoro highlighted that no Board approval would be required prior to the use of the Firm Service Fees and that Trans Mountain would be the ultimate decision-maker

as to how the fees were spent. Tesoro claimed that Trans Mountain's apparent intention was to minimize its disallowance risk and potentially increase its return on investment.

According to BP, Trans Mountain should not collect toll revenues that are in excess of its revenue requirement. Since the proposed use of the Firm Service Fee is uncertain and ill-defined, BP was of the view that the Firm Service Fee should be used to reduce Trans Mountain's revenue requirement for the benefit of all shippers. BP submitted that it was not appropriate for funds to be collected today from existing shippers to pay for undefined future projects. Rather, those projects should proceed on their own merit and be funded on the basis of each specific project, by those shippers that benefit from such investments.

Mr. Matwichuk stated that the proposed use of the Firm Service Fee as a customer contribution would be contrary to standard practice in the utility industry, since it would not be linked to any specific project. According to Mr. Matwichuk, customer contributions are ordinarily required, and associated amounts determined, in connection with a specific project based on the principle of matching costs and benefits. In Mr. Matwichuk's view, a customer contribution is intended to ensure that the shipper seeking an expansion does not unduly impact costs of the other shippers. Mr. Matwichuk indicated that such a determination was not part of Trans Mountain's proposal. More specifically, Mr. Matwichuk was of the view that there would be uncertainty as to whether a proposed project would meet the needs of all shippers and how the tolls may impact the various types of shippers.

According to Mr. Matwichuk, interest ought to accrue to the Special Deposit account at the same rate as AFUDC. The Shipper Group indicated that if a utility uses the weighted-average cost of capital for purposes of calculating AFUDC but pays carrying charges on customer contributions at a lower rate, then the utility has the potential to earn more than its allowed or negotiated return. Furthermore, Mr. Matwichuk indicated that there were insufficient details on the record to permit a determination of the potential tax consequences related to the proposed treatment of the Firm Service Fee.

According to Mr. Matwichuk, Trans Mountain's Capital Investment Policy does not appear to contemplate the customer contribution scenario outlined in the Application. From his reading of the document, it was apparent that Trans Mountain's Capital Investment Policy is intended to preclude harm to both shippers and Trans Mountain. According to Mr. Matwichuk, the Application would contravene the Capital Investment Policy because capacity reallocation would be beneficial to some shippers and harmful to others. Finally, Mr. Matwichuk suggested that a no harm test should be one of the Board's considerations in its assessment of this Application.

**Submissions of Chevron**

Chevron took the position that the Firm Service Fee should be refunded to all shippers. According to Dr. Gaske, a refund would not artificially reduce tolls but rather, would reflect the net cost of providing regulated service. Further, the refund of the Firm Service Fee would not necessarily lead to cross-subsidization from Dock shippers to Land shippers. Dr. Gaske stated that cross-subsidization cannot be established solely on the basis that a shipper is paying a toll above the average toll per barrel. Some of the factors that Dr. Gaske agreed should be considered when assessing whether a cross-subsidy exists include:

- the total amount of market-based fees as compared to the total revenue requirement;
- the number of shippers who pay market-based fees; and
- how far a shipper is getting from paying its allocated embedded cost of service.

Chevron stated that, given that a large number of Dock shippers are also Land shippers, those who pay the Bid Premium are also those who receive it thereby alleviating any concern about cross-subsidization.

Dr. Gaske's position was that it would be an extraordinarily large step for a regulator to allow the use of customer contributions for undefined capital projects. Rather, customer contributions are typically used when a customer requires unusually expensive services which cannot be fully covered in rolled-in tolls. Furthermore, Dr. Gaske was of the view that the use of the Firm Service Fee for capital projects would not lower the cost of future capital projects as claimed by Trans Mountain but would instead have current customers providing financing for future projects. Finally, Dr. Gaske stated that it would be unfair to require current shippers to support hypothetical future projects. Trans Mountain's shippers may change in the future and some may benefit from Firm Service Fees without sharing the burden of pro-rationed capacity.

Dr. Gaske questioned whether all shippers would benefit from the use of the customer contributions for preliminary work on projects that were not ultimately put in service. Dr. Gaske also raised a concern that the customer contribution could be applied towards an expansion that would only benefit Firm Service Shippers. In considering preliminary activities to be undertaken with the customer contribution, Chevron was of the view that any projects that would increase the capacity of the system would generally be beneficial to all shippers. However, Chevron maintained that Firm Service Fees are not required to develop capital projects because, as a common carrier pipeline, Trans Mountain can seek support from its shippers and the Canadian Association of Petroleum Producers for worthwhile projects.

**Submissions of Imperial**

Imperial opposed the treatment of the Firm Service Fee because it would allow for pre-collection of funds for undefined projects. Imperial was of the view that this would benefit Trans Mountain's shareholders and be contrary to regulatory principles as well as cost-of-service principles fundamental to just and reasonable tolls in a regulatory environment. Imperial argued that the Application is about Trans Mountain's attempt to collect market-based fees, which would reduce Trans Mountain's risk, with minimal ongoing regulatory scrutiny.

## 5.3 Potential Conditions on the use of Firm Service Fees

During the oral portion of the hearing, the Board floated four potential conditions that could be applied to any approval of the proposed use of the Firm Service Fee. The conditions floated are as follows:

1. Firm Service Fees cannot be spent on a project until that project has received regulatory approval.

2. Trans Mountain needs to implement a formal dispute mechanism, perhaps similar to that included in the 2011 NTS, to handle shippers' complaints related to the use of Firm Service Fees.
3. The customer contribution liability account on the balance sheet of Trans Mountain can only be debited after a project receives regulatory approval.
4. Trans Mountain is required to come before the Board if Firm Service Fees are not spent within a certain amount of time.

**Submissions of Trans Mountain**

Trans Mountain indicated that Firm Service Fees could only be applied to prudently incurred costs and that the spending of the Firm Service Fees would be subject to a two-part test:

1. Whether the Firm Service Fee is spent on the development of projects (as allowed by the TSA); and
2. Whether the amount spent was prudently incurred i.e. did Trans Mountain spend more than what would have been efficient to spend.

According to Trans Mountain, the assessment of the second part of the test would be done either via a general rate application or a negotiated settlement. In both cases, the final outcome would be subject to debate by shippers and approval by the Board. Trans Mountain argued that the implementation of the proposed conditions could delay or preclude the proposed use of the Firm Service Fees and that such a delay would not serve the interests of all shippers.

If either of Conditions #1 and #3 were imposed, Trans Mountain stated that it would be reluctant to develop projects because it would have to spend money in advance, not knowing whether a project would be approved; this would effectively put millions of dollars of development costs at risk. In respect of Condition #2, Trans Mountain submitted that such a condition would not be appropriate because the possibility of getting all shippers onside with all potential projects was unlikely. More specifically, such a condition would not allow projects such as Westridge dock or tank expansions to proceed because a dispute mechanism may result in implementation of only those projects that benefit every single shipper from its own perspective.

Regarding Condition #4, Trans Mountain was of the view that it would be using the Firm Service Fees fairly rapidly and it would be unlikely to have funds sitting in the Special Deposit account for an extended period of time. Trans Mountain did not see this condition as being overly onerous on its own but would be concerned if it were combined with other conditions due to timing considerations.

**Submissions of Intervenors**

According to Firm Service Shippers, Condition #1 would slow down expansions to the West Coast. It was further suggested that this condition could have a perverse outcome because Firm Service Shippers would be paying fees to do preliminary work for expansions and, at the same time, Firm Service Shippers could be asked to backstop this preliminary work. This could create a situation where Firm Service Shippers would have to pay twice for the same study.

Chevron, BP and Suncor argued that no conditions could fix the fundamental problems of the Application. However, those parties supported the implementation of additional controls on Trans Mountain to increase transparency and accountability for the use of the Firm Service Fee, if the proposal were to be approved by the Board.

In the event that Trans Mountain does not spend the Firm Service Fees in the customer contribution account within a reasonable amount of time, it was Chevron's position that it should be refunded to all shippers.

***Views of the Board***

When considering the appropriateness of Trans Mountain's proposal related to the Firm Service Fee, the Board first needs to consider whether the proposal complies with Part IV of the Act, in particular sections 60, 62 and 67. If it does, the Board would then need to determine whether the treatment of the Firm Service Fee as a customer contribution is appropriate in the circumstances. These two aspects will be considered sequentially below.

Section 60 of the Act stipulates that a company shall not charge any tolls except those that are specified in a tariff that has been filed with the Board and is in effect, or tolls approved by an order of the Board. The Firm Service Toll would be calculated as the sum of: (i) the applicable uncommitted toll in accordance with the effective Tariff; and (ii) the Firm Service Fee established through the Open Season process. The Board recognizes that the applicable uncommitted toll will need to be approved by the Board from time to time, over the term of the TSA. In contrast, the Firm Service Fee, which would be an integral component of the Firm Service Toll, will remain constant and be in effect for a period of 10 years.

The Board notes that the Firm Service Fees were established following an open, transparent and fair Open Season process where all potentially interested commercial parties were invited to participate. The Open Season process is discussed in Chapter 4. In this context, the Board notes that the Firm Service Fees are the result of bids from sophisticated commercial parties who were prepared to commit to the requirements of the TSA. The Board views these fees as being a reflection of the value each bidder placed on the Firm Service offering based on informed economic judgment. In the assessment of the Firm Service Fee specifically, the Board has placed significant weight on the appropriateness of the process by which the Firm Service Fees were determined. While Trans Mountain did not submit evidence specifying the exact Firm Service Fees each shipper will pay, the Board is of the view that sufficient details of the Firm Service Fee structure and Open Season process have been disclosed, as well as the average value of the Firm Service Fee of $1.45, to meet the requirements of section 60.

Throughout the hearing, a number of shippers challenged the appropriateness of the Firm Service Fee, arguing that it would result in tolls that were unjustly discriminatory, and were not just and reasonable. The Board notes that the Firm Service Fee will be an addition to the applicable uncommitted toll resulting in a Firm Service Toll that is higher than the comparable uncommitted toll. Further, Firm Service is distinct from and preferential to uncommitted service on the Pipeline due to its first priority unapportioned access to the Westridge dock. Based on the differing levels of commitment and service, the Board is satisfied that there is no unjust discrimination between Firm Service Shippers and Uncommitted Shippers. Also, the Board notes that the Firm Service Shipper, having bid the highest Firm Service Fee, will receive the highest priority service, including commodity selection and the fulfillment of makeup rights. In the Board's view, these differences among Firm Service Shippers are sufficient to alleviate any potential issues related to unjust discrimination among Firm Service Shippers. For these reasons, the Board finds that the Firm Service Fees are just and reasonable.

Regarding the appropriateness of auctioning capacity for the long-term based on biddable tolls, the Board acknowledges that the Bid Premium was accepted due to unique circumstances which were prevalent at the time of its approval. The Board notes that some of those circumstances still exist today. Specifically, capacity at the Westridge dock remains scarce and the marine deliveries are still required to be non-rateable, tankersize and coordinated with marine transportation. However, the amounts collected through the Bid Premium have reached a level that was not expected at the time of its approval.

Nevertheless, the Board is not bound by specific aspects of its previous decisions on the Bid Premium or circumstances that were prevalent at the time of its approval. In this regard, the Board is persuaded that, given existing circumstances on the Pipeline, using the Firm Service Fee to auction scarce Westridge dock capacity for the long-term is an appropriate and rational approach.

Based on the discussion above, the Board finds that the Firm Service Fees comply with section 60, 62 and 67 of the NEB Act.

As was discussed above and in previous chapters, the Board acknowledges that the Pipeline is facing unique circumstances where the demand for both Westridge dock and Land Destinations significantly exceeds existing capacity. Also, some Trans Mountain shippers have expressed the need to reduce the uncertainty related to physically and financially accessing the Westridge dock, in their efforts to develop new offshore markets. In the Board's view, these unique circumstances, among others, warrant a unique and innovative solution.

Innovation can contribute to an efficient response to changing market dynamics. The Board notes that the tools required for pipelines to innovate to meet market requirements will vary depending on the specific market circumstances. Given the specific circumstances currently facing the Pipeline, the Board is of the view that the applied-for treatment of the Firm Service Fee is an appropriate and innovative approach; the Board accordingly approves the proposed treatment on the basis set out below.

The proposed treatment of the Firm Service Fee will allow Trans Mountain to advance incremental capital projects and conduct preliminary activities in support of a potential expansion of the Pipeline. The Board is persuaded that the advancement of these capital projects and activities have the potential to benefit all shippers by enabling Trans Mountain to develop its system to meet the demand for capacity and transportation. In the Board's view, refunding the Firm Service Fee to all shippers, similar to the Bid Premium, would not offer the potential benefit of addressing capacity issues over the longer term. Notwithstanding the approval of the treatment of the Firm Service Fee, the Board reminds all stakeholders that any future capital projects on the Pipeline will be subject to the appropriate regulatory and public scrutiny and assessment, as required by, among other things, the Act and related regulations.

The Board understands the concerns raised by various shippers with allowing Trans Mountain to make the ultimate decision on how the Firm Service Fee will be spent. In this regard, the Board notes that Trans Mountain will apply the Firm Service Fee only to projects that have passed the speculative stage and have reached the development stage. The Board further notes that regulatory oversight will be exercised over Trans Mountain's use of the Firm Service Fees. Trans Mountain's stakeholders will have various opportunities to examine the manner in which Trans Mountain spends the Firm Service Fee and raise any issues identified with the Board. Such opportunities include the negotiation or assessment of a toll settlement or participation in a general rate application. Further scrutiny could occur through a financial regulatory audit initiated by the NEB.

Furthermore, Trans Mountain will be filing publicly with the Board annual reports outlining how Firm Service Fees were spent during the year. Those annual reports will contain sufficient details to allow parties to see how Trans Mountain manages the Firm Service Fees and provide an opportunity to assess the amount spent on each specific project.

Finally and most importantly, the Board expects Trans Mountain to solicit input from all shippers regarding the specific projects or initiatives to be undertaken and to adjust the use of the Firm Service Fee to the extent possible, based on that input.

Considering the numerous checks and balances outlined above, the Board has decided not to impose conditions on when the Firm Service Fees could be spent. The Board accepts that such conditions could have defeated the fundamental purpose of the applied-for treatment. However, in the event any Firm Service Fees are not spent within a three-year period, Trans Mountain will be required to file a report with the Board explaining how it intends to manage those Firm Service Fees in subsequent years.

Trans Mountain will also be required to calculate AFUDC as described in the Application.

The Board recognizes that the treatment of the Firm Service Fee is not the manner in which customer contributions are typically handled because there is no specific project tied to the Firm Service Fees at the time they are collected from Firm Service Shippers. In the Board's view, this distinction should not prevent Trans Mountain from being innovative in trying to address the various issues currently facing the Pipeline. The Board further notes that the applied-for treatment was specified in the Open Season documents such that Firm Service Shippers who are paying the Firm Service Fees are supportive of this treatment.

To the extent that the treatment of the Firm Service Fee reduces Trans Mountain's business risk, the Board is cognizant that this reduction in risk could be reflected in future toll determinations, and accordingly, should not result in any inappropriate benefit to Trans Mountain and its shareholders.

## Chapter 6

# Firm Service Terms

Trans Mountain proposed other terms of the Firm Service offering in its Application. These included Expansion and Step-up Rights, removing the Advanced Dock Nomination requirement and removing the Priority Destination designation.

## 6.1 Expansion and Step-up Rights

**Submissions of Trans Mountain**

Trans Mountain indicated that Firm Service Shippers would have two rights in the event of an expansion. The first is the Expansion Right, which is the entitlement of being offered their current contract volume prior to any other shippers or third parties in an expansion open season. The second is the Step-up Right, which is an option to double a Firm Service contract volume prior to offering any such additional volume to any other shippers or third parties in an expansion open season. The rights could lead to contracted volumes up to 17 200 $m^3/d$ (108,000 bpd) being reserved in the event of expansion.

Trans Mountain submitted that these rights are appropriate for Firm Service Shippers for the following reasons:

- given that the system is expandable to 111 300 $m^3/d$ (700,000 bpd), the incremental use of 8 600 $m^3/d$ (54,000 bpd) by Firm Service Shippers is not significant;
- Firm Service Shippers will have provided funds through the payment of Firm Service Fees that would largely cause the next expansion to be more economical; and
- expansion rights have recently been filed in respect of Enbridge Southern Lights and TransCanada Keystone.

Trans Mountain pointed out that these rights have been separated from the commercial terms of an expansion as Firm Service Shippers do not have any preferential rights around rates in the event of an expansion and these rates have not yet been determined. Furthermore, Trans Mountain explained that the system would be able to expand to meet whatever capacity the market needed. Trans Mountain did acknowledge, however, that if there was demand larger than a small expansion, but not enough to fill a larger expansion, the Firm Service Shippers would be able to have their rights entrenched in the smaller expansion.

**Submissions of the Firm Service Shippers**

Cenovus submitted that these rights would be important to the Firm Service Shippers if the offshore market develops significantly. If there is only a small expansion, then the market off the West Coast would not be significantly developed and there would be little value in the option. Cenovus stated that these rights would allow the Firm Service Shippers to avoid being

curtailed in the event that the open season is oversubscribed. Cenovus also submitted that Firm Service Shippers are taking some risk by making long-term commitments and that it is consistent with industry practice that there is also some reward when risk is taken; often, that reward is an option on certain capacity.

Nexen stated that the expansion rights were, in its view, a key component of the Application. Nexen submitted that certain access to the Westridge dock would enable it to start the market development that would appear to support a future expansion.

PetroChina did not put a price on the expansion rights and indicated that it had placed less emphasis on this provision as compared to other aspects of the commercial agreement.

**Submissions of Chevron**

According to Chevron, any problems arising from the Application, once in place, would be perpetuated in relation to future capacity on the Pipeline in the event of an expansion as Firm Service Shippers would receive priority on volumes up to two times that shipper's current contract volumes.

In Dr. Gaske's view, the expansion option should not be bundled with the right to transport on the current system. He further stated that selling the expansion option at whatever the market will bear is inappropriate as a pipeline could manipulate the value of the option based on whether or not the pipeline intends to expand. If selling the options is profitable, the pipeline would not be incented to expand.

## 6.2 Advanced Dock Nominations

Nominations to all pipeline systems out of the WCSB are due on the same day of the month. Shippers to the Westridge dock currently can make their nominations two days in advance of this date. In the Application, Trans Mountain proposed to eliminate the Advanced Dock Nomination provision in the Tariff.

**Submissions of Trans Mountain**

According to Trans Mountain, the Advanced Dock Nomination provision was introduced in 2006 to address shipper concerns that unsuccessful Westridge dock nominated volumes could be stranded in the Edmonton hub. Trans Mountain stated that the increased ex-Edmonton take away capacity has significantly reduced the likelihood of volumes being stranded in Edmonton.

Trans Mountain submitted that, while leaving the provision in the Tariff would not harm Trans Mountain, the provision would have to be amended due to the terms and conditions of Firm Service. Under the proposed Application, Firm Service Shippers dictate the available capacity, accepted commodities, and the loading windows. As such, successful Uncommitted Dock Shippers would not know if their nominations were accepted and be able to make further decisions on them until Firm Service Shippers nominated and these factors were known. This implies a need to have everyone nominate on the same day. If Firm Service Shippers were required to nominate two days in advance, two days of the trading week would be lost to them.

**Submissions of the Firm Service Shippers**

Astra submitted that a requirement for everyone to nominate on the same day to all pipelines would create a fairer playing field since the market can change in two days.

**Submissions of the Shipper Group**

Suncor asserted that due to the unique "all-or-nothing" nature of the Westridge dock, the Advanced Dock Nomination provision is still required. Suncor submitted that without the provision, it would be difficult for a shipper to arrange for alternative transportation in the event that its bid for spot Westridge dock capacity is unsuccessful. This may make Westridge dock capacity too risky to be a viable alternative for shippers. As well, it may force shippers to nominate excess capacity on other pipelines as a contingency in case their bids are unsuccessful, and/or cause bids to be artificially increased because shippers may feel pressure to increase bids to ensure capacity. If an unsuccessful shipper has the crude in its possession, it may leave the shipper trying to find a buyer for crude at the last minute. Alternatively, if a successful shipper does not have the crude in its possession, it may leave a shipper at the last minute "being held hostage" to find crude to fill its volumes. This would be complicated further under Firm Service where a shipper would have to source a similar type of crude as the Firm Service Shippers.

Suncor stated that the Advanced Dock Nomination provision would: ensure shippers are able to plan their transportation appropriately; remove unnecessary upward pressure on spot capacity premiums; and keep the Westridge dock as a viable alternative for the greatest number of shippers. Suncor proposed that the Advanced Dock Nomination process should be kept for all Westridge dock shippers.

**Submissions of Chevron**

Chevron submitted that all Westridge dock shippers should use the Advanced Dock Nomination process. Chevron indicated that the primary reason to keep the Advanced Dock Nomination provision in the Tariff is to permit unsuccessful bidders for capacity to find an alternate means to ship their product. Chevron anticipated that if Trans Mountain's proposal is accepted, Uncommitted Dock Shippers could be denied access to the Westridge dock more frequently and that they would need to renominate on short notice more often. According to Chevron, in these circumstances, the original reasons for introducing the Advanced Dock Nomination apply even more strongly.

Chevron asserted that a successful Uncommitted Dock Shipper may be forced to ship the same crude type as the Firm Service Shippers as Trans Mountain has a two-commodity rule on the Westridge dock. Under the proposed Tariff, Firm Service Shippers have priority over which crude types are moved over the Westridge dock. Chevron recognized that if only Uncommitted Dock Shippers bid two days in advance, the successful bidder would receive no assurance regarding loading window or crude type.

## 6.3 Priority Destination

**Submissions of Trans Mountain**

The Priority Destination clause was introduced in November 1985. Trans Mountain stated that the provision has not been used and that the proposed Tariff amendments would allow shippers the opportunity to mitigate apportionment. According to Trans Mountain, inclusion of the clause in the Tariff is not necessary or appropriate because:

- there is no benefit to any potential priority designation shipper in having the clause in the Tariff. A shipper desiring the designation could still apply directly to the Board even if the clause is not in the Tariff;
- it would be confusing as there are no "Priority Destination" shippers; and
- it would make defining the allocation priorities between Firm Service and uncommitted capacity overly complicated.

**Submissions of Chevron**

Chevron argued that so long as this provision remains in the Tariff, a shipper is entitled to relief if it meets the requirements specified in the Tariff. If the provision were removed, a shipper wanting relief would first have to bring an application to revise Trans Mountain's Tariff. It would then need to qualify under the provisions of the revised Tariff. This would make the approval process more extensive as there is the additional step of needing Tariff changes.

According to Chevron, the advantage of including this provision would be that it permits shippers to plan for the future of facilities that have no economic alternative source of supply on the premise that, if they meet the requirements of the Tariff, they would receive Priority Destination service. In the absence of this provision, investments in land-based facilities would face unacceptable levels of risk as there would be no assurance of service even if there were no economic alternative means of obtaining supply.

Chevron submitted that in 2003 and 2005, it brought applications to the Board seeking an order designating the Burnaby Refinery to be a Priority Destination. Both applications were withdrawn after negotiations.

Chevron indicated that, when the provision was implemented, the Pipeline was in material apportionment. Trans Mountain applied for a revision of its Tariff to provide priority for shipments to facilities that had historically received service from the Pipeline and had no economic alternative available to them. According to Chevron, the "Priority Destination" provisions of the Tariff were introduced for reasons that still apply today.

Chevron stated that it would be willing to consider other models, including a firm-type service, contingent on terms and conditions, but that such service was never offered to it. Chevron conceded that if a party receives priority designation, it would be the same as the recipient getting firm capacity without paying any additional fee.

*Views of the Board*

**Expansion and Step-up rights**

The Board notes that some Firm Service Shippers, like Nexen, indicated that these rights are an important component of the Firm Service package while others, like PetroChina, indicated that the rights were of lesser importance in their evaluation of the commercial package. The Board is of the view that such expansion rights are inappropriate in the circumstances.

The Board acknowledges that there is generally a reward for risk taken. However, in the Board's view, the priority access on the Pipeline would be adequate reward for the 10 year take-or-pay commitment.

Furthermore, the Board heard that Trans Mountain would size an expansion to meet market demand. Therefore, the Board is not convinced that the Expansion and Step-up rights would be needed in this case. While the Board acknowledges that if market demand is larger than expansion capacity, Firm Service Shippers may be curtailed, the Board finds that the risk/reward relationship is acceptable without the Expansion or Step-up rights.

The Board does not approve the Expansion Rights and Step-up Rights provisions of the TSA.

**Advanced Nomination**

The Board is not convinced that the Advanced Dock Nomination provision is no longer needed. The Board understands that if only Uncommitted Dock Shippers nominate two days in advance, the successful nominator would receive no assurance regarding loading window or crude type. The Board agrees that unsuccessful Uncommitted Dock Shippers require time to renominate volumes on other pipelines. The Board acknowledges that removing the Advanced Dock Nomination provision could leave unsuccessful Uncommitted Dock Shippers in a difficult situation that could lead to shippers applying contingent strategies in their nomination process. The Board heard submissions that the market could change in two days and, therefore, everyone should nominate to all pipelines on the same day. On balance, the magnitude of such potential market changes does not outweigh the harm unsuccessful Uncommitted Dock Shippers could experience.

Recognizing that the Firm Service Shippers dictate the available capacity, accepted commodities, and loading windows, the Board directs Trans Mountain to require Firm Service Shippers to nominate committed volumes two days in advance. The current process for uncommitted Dock volumes will be maintained, allowing for advance and regular

nominations. The Board further directs Trans Mountain to file a revised Tariff reflecting the Advanced Dock Nomination provision.

**Priority Destination**

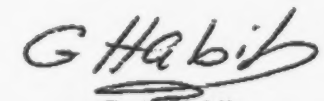
The Board is not convinced that the complications of including this provision in the Tariff would outweigh the benefits. Shippers without an economic alternative method of supply would benefit from transparency of conditions they must meet to be given a Priority Destination designation. Therefore, the Board directs Trans Mountain to file a revised Tariff reflecting the Priority Destination provision.

## Chapter 7

# Disposition

The foregoing chapters constitute our Reasons for Decision in respect of the Application considered by the Board in the RH-2-2011 proceeding.

Having denied selected components of Trans Mountain's Application, the Board directs Trans Mountain to file for approval an updated Tariff, reflecting the Board's decisions in this proceeding.



G. A. Habib
Presiding Member

R.R. George
Member

L. Mercier
Member

Calgary, Alberta
December 2011

## Appendix I

# Revised List of Issues

The Board has identified but does not limit itself to the following issues for discussion in the proceeding:

1. Whether offering some of the existing uncommitted capacity to the Westridge marine terminal as committed capacity is appropriate.

    a. If so, whether the applied-for Amendments to the Pipeline Tariff Rules and Regulations are appropriate;

2. Whether the re-allocation of a portion of land capacity to Westridge dock capacity is appropriate;

3. Whether the Open Season process was appropriate;

4. Whether the method to determine the Firm Service Fee is appropriate; and

5. Whether the proposed use of the Firm Service Fee is appropriate.